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MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

SEPTEMBER 30 TO DECEMBER 20, 1913

JAMES M. REASONER
STATE REPORTER

O-12/31/21

VOL. 177

FIRST EDITION

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CALLAGHAN AND COMPANY
1914

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JUNE TERM, 1913.*

SEEBACH *v.* MICHIGAN UNITED RAILWAYS CO.

1. STREET RAILWAYS—NEGLIGENCE—OPERATION OF CARS.
Evidence that plaintiff's wagon was struck by defendant's car as plaintiff attempted to turn around, that he saw the car nearly 600 feet away when he started to drive on the track, and believed that he had time to make the turn, but was delayed somewhat by the size of his load and by the sliding of his wheel on the rail, that the car ran 195 feet after it struck plaintiff's wagon and the motorman saw that plaintiff could not get out of the way, at a point 200 feet from the place of the accident, testimony being also introduced to show that the car could be stopped in less than 80 feet if it was not exceeding a speed of eight miles an hour, warranted the submission to the jury of the question whether defendant was negligent.[1]

2. SAME—CONTRIBUTORY NEGLIGENCE—PERSONAL INJURIES.
It could not be said, as a matter of law, that plaintiff was guilty of contributory negligence: for a person is not chargeable with want of care, as matter of law, if he has reasonable ground, in the exercise of ordinary diligence, to believe that he can cross the track safely. Nor was the verdict contrary to the weight of the evidence.

3. TRIAL—CONDUCT OF CROSS-EXAMINATION.
Any error that the trial court may have committed in refusing to permit defendant's counsel to cross-examine the motorman who operated defendant's car, offered by plaintiff for examination as defendant's agent or servant, under Act No. 307, Pub. Acts 1909 (5 How. Stat. [2d Ed.] § 12865), was cured or made harmless by the fact

[1] On the question of injuries by street car collisions with vehicles or horses, generally, see note in 25 L. R. A. 508.

* Continued from Vol. 176.

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that answers to the questions were later elicited from the witness: the proposed cross-examination was proper in behalf of defendant.

Error to Jackson; Parkinson, J. Submitted October 18, 1912. (Docket No. 157.) Decided September 30, 1913. Rehearing denied November 3, 1913.

Case by Fred H. Seebach against the Michigan United Railways for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Sanford W. Ladd, for appellant.

Thomas M. Poynton, for appellee.

BIRD, J. When plaintiff received the injuries complained of in this suit, he was driving in a one-horse wagon in an easterly direction on East Main street in the city of Jackson. The defendant's track occupies the center of the street, and the plaintiff was driving between the track and the south curb, which is 16 feet. To avoid an automobile which was standing in front of a residence, he turned out to go around it, and in so doing drove his left wheels on the track. Before he could circle around the automobile and get clear of the track, his wagon was struck by a westbound car, and he was thrown out and badly injured. It appears that the cars operated on East Main street go as far east as Horton street, where they turn around by going onto a Y on Horton street. Before driving onto the track, plaintiff looked in both directions and saw the car in question at Horton street, 595 feet to the east, and concluded that he had time to go around the automobile before the arrival of the car. He was delayed somewhat by the fact that his wagon had a long reach and was heavily loaded, which made it necessary to make a larger circle than would have been necessary with a shorter reach. In

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leaving the track, his left front wheel was slow in mounting the rail, which also added to the delay in clearing the track.

The plaintiff recovered a judgment in the trial court, and the defendant assigns a large number of errors, the gist of which is that the testimony does not show that the defendant was negligent, and because the testimony does show that the plaintiff was guilty of contributory negligence.

The negligence with which defendant was charged was its failure to exercise reasonable care and caution in the operation and management of the car so as to avoid colliding with plaintiff's wagon. To establish this allegation, the plaintiff showed that, when the car started on its return trip at Horton street, it was late, and that the motorman was told by the crew on the car following him "to go right down through, without stopping to pick up passengers, as they would do that;" that the car started and made no stop until after the collision. One witness testified from his observation that the speed of the car was not slackened until the collision took place, and another one testified that the car seemed to be going faster after the collision than before. After the collision the car ran 195 feet before it was stopped, and it was shown in connection with this that the car, under the weather conditions existing on the night in question, could have been stopped in about 70 or 80 feet, if going only 8 miles an hour, as claimed by the motorman. The motorman admitted that the street was sufficiently lighted to enable him to see the automobile while he was at Horton street. Later he saw plaintiff drive onto the track, and at Forbes street, while approximately 200 feet away, he concluded plaintiff was not going to get off the track before the car reached him. It was contended by the motorman that, when he saw that plaintff was not likely to get out of the way, he turned off his power, applied the brakes, and

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reversed his car; but by reason of the dampness of the rail, he was unable to stop. The inference is very strong that the motorman was acting upon the suggestion of the crew following him in order to regain his schedule time, and that he indulged the presumption that plaintiff would clear the track by the time he reached there so long that he was unable to stop. If such were the case, the defendant was negligent, and the question as to whether the motorman operated and managed his car in a reasonably prudent manner, in view of the situation as it existed, was a fair question to be determined by the jury.

Was plaintiff guilty of contributory negligence? We do not think it can be said, as a matter of law, that a driver upon the highway, who turns out to avoid an obstruction in his way, and in so doing drives onto the track, when he sees an approaching car 595 feet away, is guilty of contributory negligence. The contributory negligence of the plaintiff was a question of fact for the determination of the jury, and came clearly within the line of cases which hold that—

"Where, in the exercise of common prudence, a person may reasonably think there is time to cross a street railway safely, he is not chargeable with negligence in attempting it." [*Chauvin* v. *Railway*, 135 Mich. 85 (97 N. W. 160)].

Ryan v. *Railway Co.*, 123 Mich. 597 (82 N. W. 278); *Chauvin* v. *Railway, supra; Gaffka* v. *Railway*, 143 Mich. 456 (106 N. W. 1121); *La Londe* v. *Traction Co.*, 145 Mich. 77 (108 N. W. 365); *McQuisten* v. *Railway Co.*, 147 Mich. 67 (110 N. W. 118); *Deneen* v. *Railway Co.*, 150 Mich. 235 (113 N. W. 1126, 13 Am. & Eng. Ann. Cas. 134).

The claim is made by defendant that the verdict was against the weight of the evidence. We cannot agree with counsel in this contention. The testimony on behalf of plaintiff was sufficient, if believed by the

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jury, to justify them in returning a verdict for him.

The motorman was called by the plaintiff under the statute (Act No. 307, Pub. Acts 1909), and was cross-examined. Defendant then insisted upon his right to cross-examine the witness; the plaintiff objected, and the court ruled that:

"I realize the defendant in this case cannot cross-examine this witness, as the term 'cross-examine' is understood by the profession; but I think that the defense ought to have an opportunity to ask this witness such further questions as would leave the testimony of the witness in complete condition, and I will so rule, trusting counsel will not forget he is not cross-examining the witness."

Following this ruling, several questions were objected to by the plaintiff and sustained by the court; but in each instance the answer to the question was later elicited from the witness, and therefore we think no harm resulted to the defendant's case by reason of the erroneous ruling. The cases of *Jones* v. *Railroad Co.*, 168 Mich. 1 (133 N. W. 993), and *Johnson* v. *Carbide Co.*, 169 Mich. 651 (135 N. W. 1069), settle the question affirmatively, that the cross-examination offered was proper.

Further complaint is made with reference to the reception of certain testimony offered by the plaintiff. We have examined the objections thereto, but find no error in the rulings of the court admitting them. We are also of the opinion that the objections made to the sufficiency of the declaration are without merit.

The judgment of the trial court is affirmed.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and OSTRANDER, JJ., concurred.

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FOLKS *v.* BURLETSON.

1. PARTNERSHIP — EVIDENCE OF EXISTENCE — HOLDING OUT — ESTOPPEL.

Testimony tending to show the establishment of a private bank by several defendants, who were held out in advertisements and statements made as partners in the concern, and testimony tending to show that they were engaged in the attempt to organize several private banks with another incorporated bank in which they were interested as a center, *held*, to sustain a verdict for plaintiff against the members of the alleged partnership, on the theory that defendants permitted themselves to be held out to the public as partners in the private banking firm.

2. SAME—MISREPRESENTATION.

As applied to partners, such holding out is fundamentally predicated on the general principle of estoppel by conduct, but comprehends, also, indirect misrepresentation and signifies that the purported partners have, by language and conduct, represented themselves, or knowingly have suffered others to represent them at large, as partners in such manner and to such an extent as to lead the public to believe that they are partners in fact.

3. SAME—AUTHORITY TO REPRESENT—FRAUD.

It is not necessary to show express authority to hold out a person as member of the firm; authority may be inferred from defendant's conduct. If he has, by signing prospectuses, or by being party to resolutions, or by statements made, or has in any other way so conducted himself as, in fact, to have authorized the holding out, he is liable.

4. SAME—EVIDENCE—MEMBERS OF FIRM.

It was not error to admit in evidence an advertisement relating to a State bank in a neighboring town, wherein the defendants were mentioned by name as officers, directors and stockholders, followed by a statement that they were back of the private bank in question, representing a responsibility of about $300,000.

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5. SAME—HEARSAY.

Nor was it error to admit statements made by persons employed and placed in charge of the bank that defendants or some of them were running the private bank; the rule that an agent's authority cannot be proved by his own declaration was not violated thereby.

6. SAME—EVIDENCE—TESTIMONY OF PARTNER'S ADMISSIONS.

Where one of the defendants admitted his liability, after he had pleaded the general issue and did not suffer default to be entered against him, his representations, not made in the presence of the remaining defendants, and supported by his testimony showing copartnership relations, were properly received in evidence to establish the connection of defendants with the bank: and any possible error was cured by the action of the court in charging the jury that this evidence should not be considered.

7. SAME—TRIAL—CHARGE—ESTOPPEL.

The court did not in anywise prejudice defendants by instructing the jury that a person who holds himself out as a partner of a firm is estopped to deny the representations as to the persons to whom the statements were made and as to others who acted in reliance on them, that reliance on mere rumor or hearsay would not be reasonable diligence, unless there was actual holding out to the public, that defendants' denial of any knowledge of such representations or statements should be a defense, unless the greater weight of the evidence established the contrary, that if there was a general holding out to the public by one or more of the defendants as members of a partnership or joint venture, depositors of the bank who relied thereon could recover: any possible error in such charge was in favor of the defendants as to the distinction between liability by holding out and liability by estoppel.

8. SAME.

The fact that a creditor relied on mere hearsay or rumor would not preclude him from recovering if he could establish by proof of facts and circumstances a holding out of defendants as members of the firm.

9. SAME.

Evidence that defendants suffered themselves to be held out as partners in the bank, and in fact associated together under an agreement to share the profits, al-

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though defendants denied the claim, warranted the trial court in finding that the verdict was not contrary to the weight of the evidence.

10. SAME.

All that is generally required to constitute a partnership as between the parties is that there should be an agreement to share in the profits and losses; and even less than this may make them responsible as between themselves and third parties.

Error to Jackson; Parkinson, J. Submitted November 11, 1912. (Docket No. 143.) Decided September 30, 1913. Rehearing denied November 3, 1913.

Assumpsit by Alfred Folks against William H. Burletson, Gardner L. Hunn, Albert M. Helmer, Charles W. Bullen, and Fennor K. Corwin for certain debts or claims owing by the Farmers' & Merchants' Bank of Hanover, Michigan, a copartnership. Judgment for plaintiff. Defendants except said Burletson bring error. Affirmed.

Thomas E. Barkworth and *George E. Nichols*, for appellants.

Price & Whiting and *Benjamin Williams*, for appellee.

STEERE, C. J. This was an action in assumpsit brought in the circuit court of Jackson county, by plaintiff in his own behalf and as assignee, for the purposes of this case, of over 100 codepositors and creditors of the Hanover Bank of Hanover, Mich., a financial institution which had previously closed its doors and its brief but checkered career, with the help of a receiver appointed by the court. Plaintiff recovered from defendants a judgment, for claims which he held as a primary indebtedness of said bank, on the ground that defendants were also liable for the

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same by reason of their relations with that institution.

The declaration, filed and served in the case, was upon the common counts in assumpsit, also alleging that the indebtedness sought to be recovered arose to plaintiff and his assignors in amounts and manner as indicated in his bill of particulars attached to and made a part of the declaration, further stating that on the trial plaintiff would produce and give in evidence, under the money counts, certain certificates of deposit, copies of which were set out at length.

Defendants pleaded the general issue, with an affidavit attached denying execution of the instruments of indebtedness, of which notice was given. This affidavit is upon information and belief, which counsel for plaintiff contend is insufficient under Circuit Court Rule 8, and urge that the genuineness of the instruments therefore stands admitted under numerous authorities cited. In view of admissions found in the record and the general course of contention developed on the trial, we regard this question of but minor importance here. On the trial defendant's counsel, without directly admitting, did not seriously, or at least convincingly, contest the various claims and items of indebtedness offered and proven against the bank, but did strenuously object to and contend against them as tending to establish any liability on the part of defendants. The assignments of these claims to plaintiff were admitted on the trial. On that branch of the case, without going into details, we think it sufficient to state that in our opinion plaintiff's proofs were ample to establish against the bank, and without error so far as it was concerned, an indebtedness amounting to the sum for which judgment was recovered.

The really important issues of fact and law, to which most of the evidence and efforts of counsel were directed, are the relations which the various de-

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fendants bore to the bank, and the interest they had in it, and whether or not, as a consequence, they became liable for its indebtedness.

The testimony, as it runs, associates, more or less closely, the "Farmers' & Merchants' Bank, Unincorporated, of Hanover," and the "Farmers' & Merchants' State Bank of Parma," which took their names from, and were respectively located in, two villages of Jackson county, Mich., situated about 14 miles distant from each other; the two concerns being commonly referred to in the record as the "Hanover Bank" and the "Parma Bank." Defendant Burletson was their chief promoter and organizer and guided their destinies until their doors were closed, which occurred on the same date, in September, 1908. He became an important witness for plaintiff and did not join the other four defendants in their appeal to this court. The judgment was against all five defendants.

Some three or four years before the complications which resulted in this litigation arose, Burletson, having associated with him one D. H. Powers, who resided in Pontiac, Mich., opened a bank in Parma called "the Bank of Parma," which was run as a private bank until April, 1907, when the "Farmers' & Merchants' State Bank of Parma" was organized and incorporated under the State banking laws to take over and continue the business of the Bank of Parma. It was capitalized at $20,000, and the five defendants, all residents of Parma, constituted its first board of directors; Burletson being chosen cashier, Bullen president, and Hunn vice president. In the meantime, early in February, 1907, Burletson had widened his field of financial activities by starting the Hanover bank. It was "considered as a proposition" in connection with the organization of the Parma State Bank, and later when the Parma bank was incorporated, in April, he interested and to some extent, the nature of which is in question, associated with him-

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self in the Hanover enterprise defendants Bullen, Hunn, Corwin, and Helmer, his fellow directors in the Parma bank. He testifies:

"At about the time the organization of the State Bank of Parma was shaping itself, Mr. Hunn approached me and he said it would be necessary for me to include the bank at Hanover in the organization. This was against my will at the time for I had made different arrangements; that is, I had planned differently than that. But it was finally conceded and all of the directors—in accordance with that arrangement—all of the directors went over to Hanover and looked the situation over and there decided on a lot and the price to be paid for a lot. * * * There was a building constructed subsequently on the land which the directors of the Parma bank got at Hanover, which cost approximately $1,500. We bought furniture, a screw door safe, and a vault door and equipped the office for the banking business. The name we assumed for the bank at Hanover was Farmers' & Merchants' Bank."

It is undisputed that a lot was purchased in Hanover about the time stated; that all of the defendants drove over from Parma together on the day the lot was selected; that a banking building was erected upon it, equipped as testified, and the Farmers' & Merchants' Bank of Hanover was then opened and there run until its end, during most of which time George Hunn, son of defendant Hunn, was in immediate charge of the bank as assistant cashier. On March 15, 1907, the following advertisement was published in the Hanover Local:

Farmers' and Merchants' State Bank of Parma
Will Complete Its Organization April 1, 1907, under General Banking Laws of the State of Michigan.
Capital Stock Paid in $20,000.
Stockholders.
[Giving a list of names which included defendants.]
Board of Directors.
C. W. Bullen, G. L. Hunn, W. H. Burletson, Albert Helmer, F. K. Corwin, D. H. Power.

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Advisory Board.
S. H. Godfrey, Walter Hobbins, Albert Helmer.
All of which are back of the Farmers' & Merchants' Bank of Hanover, representing a responsibility of close on to $300,000. Every favor granted consistent with conservative banking. Depositors and friends will always receive courteous attention.
Officers.
C. W. Bullen, President; G. L. Hunn, Vice President;
W. H. Burletson, Cashier;
F. K. Corwin, Chairman Board of Directors.
Four Per Cent. on Savings Deposits.

The usual stationery of various kinds was prepared and forms printed with the name of the bank upon them; the letterheads reading as follows:

C. W. Bullen, Pres. G. L. Hunn, Vice Pres.
W. H. Burletson, Cashier. Geo. W. Hunn, Ass't Cashier.
Farmers' & Merchants' Bank,
Hanover, Mich.

The above advertisement ran in the local newspaper for several weeks and the letterheads were regularly used in the business of the bank.

It was contended in behalf of plaintiff that the evidence warranted a verdict in his favor on any one of three theories, as the jury might find the facts to be: Either that defendants were shown to have been partners in fact between themselves as well as to all others, within the full meaning of that term; or that they were partners in legal effect as to third parties by reason of having been associated together in running the bank under such circumstances as constituted a general holding out that they were its owners and officers, responsible for it and back of it; or that they were estopped from denying a partnership owing to representations which they individually made or authorized. To some extent the same principles are involved in the last two propositions, but in the last one they apply more properly to defendants, and the claims against them, considered in their personal relations with creditors.

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Plaintiff conceded on the trial that his proofs of estoppel did not apply to all the claims upon which he sought to recover, furnishing in that connection a distinguishing statement to the court and jury. The verdict and judgment were for $17,582.95, the full amount of his claim. It is therefore evident, under the concessions of counsel and charge of the court upon that subject, that the jury must have found, and rendered their verdict on the theory, that defendants were, as to creditors of the bank, partners, which eliminates from the case the distinct question of estoppel.

The record contains many assignments of error too numerous and interlacing to review them all separately and in detail, but, generally stated, under them it is contended that questions of fact submitted to the jury were not properly submitted under the circumstances of the case nor sustained by the evidence, and that certain testimony was erroneously admitted for the jury to take into consideration in arriving at their verdict.

It is first earnestly urged that the court erred in overruling defendant's motion for a directed verdict in their favor on the ground that there was no evidence from which an agreement of partnership could be found nor upon which a general holding out by defendants to the public of a partnership could be predicated.

The undisputed facts already detailed would, in the absence of explanation or denial, naturally lead to the inference that defendants were associated together in the Hanover enterprise and responsible for its management. But it is claimed by the four appealing defendants that all those things which might tend to implicate them were done and the bank was owned and run by defendant Burletson, without their participation or consent and for the most part without their knowledge; and that there is no competent

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evidence tending to show either a partnership in fact or that the things done and representations made by Burletson tending to show a holding out as partners were authorized or acquiesced in by them.

We think there is testimony in this case tending to show that these defendants, already interested together in the organization and management of the Parma bank, and yet more closely associated together as its directors, sought to further extend their banking interests by together purchasing and taking over the Hanover bank, designing to run the same in connection with or under the auspices of the Parma bank and to share the profits of the Hanover bank between themselves. Losses do not seem to have been discussed and apparently were not anticipated. It is Burletson's testimony, which is in harmony with other confirmatory circumstances in the case, that a project was mooted and favorably considered by defendants when organizing the Parma bank to develop a financial center under their control and for their profit by establishing a chain of small banks in surrounding territory auxiliary to the Parma bank. Burletson had already started the private bank at Hanover and at least one other bank of like nature at Pittsford. The purchase of the Hanover bank was in line with such a project. No capital appears to have been invested in the Hanover bank. Its assets consisted of its deposits, out of which its building was erected and furnished. For a time the method of running the two banks resulted in an intermingling of bookkeeping, exchange, debits, credits, and accounts generally which, upon coming to the knowledge of the State banking department, was forbidden by it.

Burletson testifies in regard to the plans and agreement of defendants:

"This bank at Hanover was to be operated as sort of a branch bank, a branch of the Parma bank. I knew we could not operate the bank as a branch, but

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I do know we could use it as a sort of an annex. That matter was discussed among the directors and myself. They talked in directors' meetings at Parma and discussed it in general—the matter of the construction of the building at Hanover. * * * The bank at Hanover was to be generally directed by the bank at Parma, or its directors. The earnings, if any, were to go toward the expenses of the bank at Parma, * * * and it was thought by the board of directors collectively that the expenses of the Hanover bank would entirely—the earnings of the Hanover bank would entirely liquidate the expenses of the State Bank at Parma, leaving the entire earnings of the bank at Parma wholly and clearly for the stockholders and directors. I asked the board of directors if it was their wish to include all the stockholders in this arrangement, all the stockholders of the Parma bank, and it was decided not to do so, but to have the earnings of the bank apply only to the proportionate holdings of the stock by the directors in the Parma bank; * * * I mean the directors of the Parma bank were to share in the profits of the Hanover bank in proportion to their stock in the Parma bank."

This record shows that the five defendants practically owned the Parma bank, the holdings of other stockholders being comparatively small, and the incidental benefit coming to them from the application of profits to the Hanover bank towards paying the expenses of the Parma bank would be slight and fairly offset by the time devoted by Burletson to the affairs of the Hanover bank while he was under pay of the Parma bank as its cashier. Burletson further testifies:

"This matter of the division of the profits, if any, of the Hanover bank, was discussed at directors' meetings of the Parma bank directors. All of us were present. It occurred at more than one directors' meeting. It was talked several times, discussed, and generally understood. All of the directors understood it. Furthermore, at the time this Hanover bank was coming into play, it was thought a pretty good plan to have several little banks around the

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country, and I went so far as to get a list of the stockholders of the Concord bank, thinking perhaps we might be able to get hold of that. Mr. Corwin (one of the defendants) furnished me a list of the individuals who held stock in the Concord bank. * * * They all had knowledge of just how we were constructing the building and carrying on our business over there at Hanover and understood it. * * * From that time on, until the Hanover bank was closed, the bank at Parma ran it. I mean by the bank at Parma the officers and directors of the bank at Parma, of the Farmers' & Merchants' State Bank, * * * defendants named in this case. * * * In fact, there was no question ever raised in reference to the ownership of that bank up to the day the bank at Parma closed. * * *"

Speaking of the advertisement published in the Hanover paper, he says:

"I put the advertisement there. I could not tell you who made the arrangement with the printer or editor. It might have been myself. * * * I don't remember whether any one was with me when I made the arrangements for that ad. This much I do know: A copy of that paper was taken to Parma and laid on the counter at Parma where all the people who came in there could look at it. They all saw it. The directors of the Parma bank saw it; every one of them saw it."

While the witness did not remember that any one was with him when he made arrangements for the advertisement, Clyde E. Hall, the editor and printer of the paper, testifies positively that defendant Hunn was present and assisted in making the arrangements. Being shown a copy of the advertisement, he identified the same and testified in part as follows:

"Mr. Burletson and Mr. Hunn came to my office together and gave me the copy and both read the copy over with me. I also remember asking Mr. Hunn about the spelling of his name as it appeared on the copy. They both further stated that they were both there in the interest of the bank for Hanover. I also

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left my office and assisted them in interesting the business men of the village in the project."

Whether it was the intention to incorporate the bank of Hanover is not shown. Burletson testified that at a meeting of the dirctors of the Parma bank they elected as officers of the Hanover bank the same persons whose names appear in the advertisement, who held the same positions in the Parma bank, and says:

"It was not necessary for the persons who were interested in the Hanover bank to choose their officers as such. The officers who were officers in Parma were officers in Hanover. That was all there was to it. * * * The other directors knew this stationery was being ordered for the use of the Hanover bank. They knew about everything—the whole business. The whole matter was discussed in our directors' meetings."

On re-direct examination by plaintiff's counsel he was asked and answered as follows:

"*Q.* Did the directors of the Parma bank, these defendants here, understand they were taking money which was deposited in their bank in the name of the Hanover bank to build the bank building at Hanover?

"*A.* Yes, sir. * * * I know they understood that because Mr. Corwin asked me that question and I told him where it was coming from. The rest of them all knew it from general discussion of matters in board of directors' meetings, individual conversation that took place, and so on. Mr. Hunn and I spent a half day going to Horton looking towards interesting the Horton people in a bank."

The record also discloses much testimony by numerous witnesses, mostly customers of the bank and residents in and around Hanover, of an active interest shown by some of the defendants in the bank to the extent of soliciting patronage for it, giving assurances of its reliability, stating or admitting that they and the other defendants were running it and

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back of it, and of the introduction to the witnesses of others as connected with and officers of the bank, without denial on their part. Several witnesses testify with greater or less certainty to being introduced to defendants by Burletson as the parties who were about to start a bank at Hanover, when they were there together, apparently on the day when a lot was secured as a site for the bank building. Some witnesses identified all the defendants, others only certain ones.

Albert Sanderson, a merchant of Hanover, said:

"I remember the occasion of the Hanover bank being started. * * * I think it was on the 15th of April. It occurred in my store. Mr. Culbert was standing near me. Mr. Burletson came in with Mr. Hunn and four other gentlemen, Mr. Hunn and Mr. Bullen, Mr. Helmer and Corwin. I am positive there were four besides Mr. Burletson. When they first opened the bank at Hanover I was doing business at that time with the Union Bank in Jackson. They tried to get me to do business, and I explained to them why I didn't. They said they could give me a statement that satisfied me they would be all right. After they got started, not at that time, but a month or so after that, I commenced to do business with the bank after I was satisfied what they told me was correct."

William Folks testified in part:

"I am a farmer. I am a brother of the plaintiff in this suit. I am pretty well acquainted with three of the defendants in this case, Mr. Hunn, Mr. Bullen, and Mr. Burletson. About the middle of April I met Mr. Burletson there in Hanover with four other gentlemen up there from Parma, Mr. Hunn, Mr. Bullen, and as I remember the other two, it was Mr. Corwin and Mr. Helmer. At that time we had a conversation relative to the bank on the ground the bank now stands on. Mr. Burletson introduced me to these other four members as directors and officers of the Hanover and Parma banks. Mr. Hunn says: 'We are going to put up a building here and get more

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money so you can have all the money you want to buy stock with.' "

William Burdett said:

"Mr. Burletson came over to the elevator where I buy grain and brought four men and introduced them to me as directors of the Parma bank, and he said they were the men who would be back of the Hanover bank; they were looking for our business. In our business we pay out from $40,000 to $50,000 a year for grain. Two of the men that Mr. Burletson brought there were Mr. Bullen and Mr. Hunn. I can remember Mr. Hunn and Mr. Bullen, but the other two men, I don't think I ever met them before or since. I would not know them if I saw them again. I would know Mr. Hunn right there, but I would not know the other men. * * * They got our business within three days of the time they were there."

In passing upon the question of directing a verdict for defendants, the testimony on the part of plaintiff is to be taken at its strongest. So regarded, we think there was evidence to go to the jury, both on the issues of a partnership in fact *inter se* and a partnership as to third parties by a holding out.

A holding out, as the term is used when applied to partnership, while fundamentally predicated on the general principle of estoppel by conduct, comprehends indirect misrepresentation also and signifies that the purported partners have by language and conduct represented themselves or knowingly have authorized or suffered others to represent them at large as partners in such manner and to such an extent as to lead the public generally to believe that they are partners in fact.

When such a holding out is once established, not by proof of mere reputation but by proof of pertinent and convincing facts and circumstances, the parties so implicated become liable to one thus induced to give credit, not on the ground of any direct representations or dealings between the parties, but upon

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the principle of a general policy to prevent fraud and imposition to which creditors in the business world would otherwise be liable. On this subject it has been said:

"The most difficult cases of this class occur where the defendant has not held *himself* out, but where he has been held out by others, and he alleges that they had no authority to do so. Express authority is not necessary; authority may be inferred from his conduct; and if a person has by signing prospectuses or allowing his name to be put to them, or by being party to resolutions, or by his own statements, though not intended to be repeated, or has in any other way so conducted himself as in fact to have authorized the holding out which he repudiates, he will not escape liability." Lindley on Partnership (1905), p. 72.

Error is assigned on admission of the advertisement in the Hanover Local, heretofore set out. Counsel say that this notice "had no tendency to show the relation of partnership by estoppel, nor could it be used as an admission of the existence of a partnership in fact," citing *Bennett* v. *Dean*, 35 Mich. 306; s. c., 41 Mich. 472 (2 N. W. 680). In that case plaintiff sued defendants as copartners under the name of the "National Savings Bank of Jackson, Mich.;" one of the defendants having advertised the other two defendants as directors in a bank of that name and started business, receiving some deposits, though there was in fact no such bank. The court held that the two defendants were not estopped from denying that they were partners. The court said that the printed notices relied on did not import the existence of a partnership or any connection by the two defendants involving the liabilities of such relation, but did suggest the existence of an incorporated bank and tended to negative a personal liability. In this case, while notice is given of an intention to incorporate a bank of $20,000 capital at Parma, it goes much further and states in effect that the proposed

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officers named are also interested in and together backing the private bank at Hanover, in which village the notice was published, and personally liable, "representing a responsibility of close on to $300,000." We think the cases distinguishable and the notice admitted in this case competent evidence.

Testimony was admitted under objection of statements made by George Hunn and Melvin Carey relative to who was running the Hanover bank, each of whom at different times was in immediate charge of the bank and conducting its business with the public. While so employed they told parties making inquiry, and also certain persons whose business they solicited, that the bank was sound financially, being backed and run by the directors of the Parma bank, at times naming part or all of the defendants. Exception is taken to this line of testimony as immaterial and hearsay; the statements not being a part of the res gestæ because they did not accompany an act performed under an agency and were in violation of the rule that the declaration of an agent is not admissible for the purpose of proving his authority. Counsel correctly state that the only possible relevancy of this testimony must be to show a connection of defendants or some of them with the Hanover bank, but we do not think it follows that "they are clearly within the prohibition of the rule that an agent's authority cannot be proven by his own declaration." There is testimony in the case that these men were hired with the knowledge and by express authority of defendants and put in charge of the bank to represent it in dealing with the public. The scope of their employment would naturally comprehend furnishing such information as is usually desired by actual or prospective customers. The information they gave came to them in the course of their employment and was the same as had already been promulgated by an advertisement in the public press. Whether or not

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these representations were authorized by defendants is a question of fact in the case. In soliciting customers for the bank, a discussion of the financial responsibility of the institution and its backers could well be considered part of the res gestæ of such transaction. The testimony objected to contains no assertion on the part of Hunn and Carey that they were agents of defendants and had authority from them to make such representations. If their authority was not otherwise shown, the testimony would be inadmissible.

The court in instructing the jury upon that subject said:

"Testimony by depositors has been admitted as to statements made by them (that is, Carey and Hunn) to induce them to deposit there and while doing business at the bank. * * * This testimony as to such statements by Carey or George Hunn should not be considered by you unless you find from the other evidence, aside from their statements, that as regards George Hunn and Carey they were employed by the defendants, or those who may be found to have constituted the partnership or have been jointly interested, if any there were, and were at Hanover by virtue of that employment, doing the business of the defendants. * * * George Hunn could not, neither could Carey, make statements affecting those of the defendants who did not employ them or to whom George Hunn and Carey were not agents or representatives in the business of the bank. * * *"

Error is assigned and urged on refusal of the court to grant defendants' motion "to strike out all testimony of interviews with Burletson not in the presence of one or more of the other defendants." This motion was made at the conclusion of plaintiff's testimony and was then overruled. The objection is based on the case of *Scholtz* v. *Freud*, 128 Mich. 72 (87 N. W. 130), wherein the rule is laid down, as quoted from the syllabus:

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"Where two persons were sued as partners, and one of them defaulted, his statements, tending to show the existence of a partnership, should have been excluded."

In that case the court said:

"McKinney was a defendant, who had permitted his default to be entered. He thereby admitted his liability, and the amount of damages only was to be determined. See 1 Green, Prac. 460. There was therefore no occasion to show the statements of McKinney, and they should have been excluded. As the court told the jury, such statements were not binding upon Freud."

Technically and as a matter of pleading the situation is not the same here. Burletson did not permit his default to be entered. He entered his appearance and pleaded the general issue. He testified at the trial. If default is the antithesis of appearance, he was not in a legal sense in default. It is true that at the trial he gave testimony tending to support plaintiff's contention, and judgment was entered against him with the rest. But irrespective of this question, conceding that the testimony was inadmissible, the court did ultimately, in effect, grant defendants' motion and said to the jury in charging them:

"The defendant Burletson is practically in default in this case. By such default, as the record now stands, he practically admits his liability. Therefore, any statements made by him, not in the presence and hearing of any of the other defendants, not under oath, should not be received nor considered by you to show a joint contract or partnership as against the other defendants or any of them. And this you should observe if in any portion of the preceding charge I have used language that might not be understood as equivalent to this direction. But, as to Burletson's testimony in this case as a witness, that is for your consideration and to give it such credibility as you think it entitled to."

Numerous assignments of error relate to different

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portions of the charge. Some involve questions already considered, and others rule relating to partnership which it is urged were not properly presented. The charge is lengthy. Isolated portions may perhaps be pointed out which are inaccurate and insufficient, standing alone, but the jury heard it as a whole and it should be so considered. The court at length informed the jury of the nature of the case, the claims of litigants, the issues involved, and the rules of law by which they should be governed in passing upon the facts, devoting considerable time to the discussion of estoppel, submitting to them the questions of estoppel, partnership *inter se*, and partnership by holding out.

It is complained that the court did not differentiate clearly between estoppel and holding out as applied to particular claims. The court fully and correctly explained the rules of estoppel and further said:

"A person who holds himself out as a partner of a firm is estopped to deny such representations, not only as to those as to whom the representation was directly made, but as to all others who had knowledge of such holding out and in reliance thereon made deposits in the Hanover bank, provided they exercised due diligence in ascertaining the facts. One would not be exercising due diligence by relying on mere rumor or hearsay but should apply to one of the parties or some one invested with authority to make representations as to the matter, unless there was an actual holding out to the public generally. * * * These defendants engaged in contesting this case deny all holding out to the public and all knowledge of any holding out by any one and deny all knowledge of any publication or advertisements or statements or representations by any one that they had become and were connected with the Hanover bank, or its interests or its operations, or were in any manner whatsoever interested therein to any extent whatsoever. This claim in denial of such holding out to the public should be sustained by you unless the greater weight of the evidence establishes the contrary, and the

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burden of proving that they so held out, as I have before instructed you, rests upon the plaintiff. If there was a holding out by any one or more of these defendants of a partnership or joint venture generally to the public, liability would attach as to the claims of all who are shown by the proofs to have known of such holding out and believed it and in reliance upon it deposited money at Hanover and have been damaged in consequence."

We think if any error is to be found in this it is in defendants' favor.

In such case it is immaterial whether or not the creditor relied upon mere rumor or hearsay. He would not for that reason be precluded from recovering if on the trial he was able to show a holding out by proof of actual facts and circumstances which established it. This instruction points out the distinction between estoppel, in which the representation is directly made to the creditor, and a holding out which may be made to the public generally, and of which "all others" having knowledge and relying thereon may avail themselves. Considered in its entirety, we find no reversible error in the charge.

Defendants moved the trial court to set aside the verdict and grant a new trial, urging as reasons many of the questions raised during the progress of the trial, and for the further reason that the verdict was not only not supported by any competent evidence but was against the overwhelming weight of evidence on each of the propositions involved. This motion was denied and error is assigned thereon.

It is urged that the only proof of any agreement, even to share profits of the Hanover bank, is in the testimony of Burletson, who is shown to have previously claimed that he was the sole owner of the bank, and that his testimony is squarely met by the positive denial of the four appealing defendants that the agreement as testified to by Burletson would not constitute a sufficient partnership agreement to sus-

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tain the verdict, as it does not show a community of interests, or agreement to share losses, or any intent of the parties to make each other their agents, or to form a partnership. To sustain this proposition the leading case of *Beecher* v. *Bush*, 45 Mich. 188 (7 N. W. 785, 40 Am. Rep. 465), and others sustaining the same principles are cited and relied upon. In the *Beecher Case*, in deciding that no partnership was established, the court stated the general rule that to constitute a partnership there must be a community of interest in a business undertaking, in which the parties are principals and agents each for the other, entitling each to participate in the profits and entailing on each his share of any losses. In that case it appeared, undisputed, that the party sought to be charged had never held himself out, nor suffered himself to be held out, as a partner either to the public or to the plaintiff. The court held there could be no partnership even as to a third person when, as between the parties themselves there was no partnership in fact and the third person has not been misled by concealment of facts or by deceptive appearances, saying:

"If parties intend no partnership the courts should give effect to their intent, unless somebody has been deceived by their acting or assuming to act as partners; and any such case must stand upon its peculiar facts, and upon special equities"

—and it can well be added that in such cases strict definitions of partnership are not controlling and of doubtful service. In this case there is not only evidence that defendants held themselves out to the public as together running and backing the Hanover bank, or suffered others to so represent, but that they in fact associated themselves together in that business enterprise, agreeing to share the profits. While there is no evidence of an agreement to share the losses, such is always implied from an unqualified

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mutual agreement to share profits in a joint commercial venture.

"All that is generally required to constitute a partnership as between the parties, is, that there should be an agreement to share in the profit and loss; and even less than this may make them responsible as partners as between themselves and third parties." *Tyler* v. *Scott*, 45 Vt. 261.

It has been laid down as a general proposition of law that, whenever—

"It is shown that business associates are sharing the profits of a business, of which they are the joint owners, and which they are carrying on pursuant to a contract between them, they are partners, however adroitly they may have attempted to escape from the partnership relation." 30 Cyc. p. 371.

In connection with the undisputed facts, the agreement testified to by Burletson is clearly characterized by the essentials of a partnership. If Burletson's testimony was unsupported by any extraneous evidence, and the issue stood only between his word and that of the other defendants, the contention that the verdict is against the weight of evidence would require serious consideration, but his story in many particulars is more consistent with the trend of transactions and conduct of the parties than theirs and is substantiated by much other circumstantial but persuasive proof.

The two banks were located in small villages not far apart and were closely associated in many ways. They were under the management of the same men, or man, having the same cashier. They failed at the same time. One was a private bank and the other incorporated, operating under the State banking laws; gross irregularities were found in connection with both. Defendants were all directors in the Parma bank and officially responsible for its management and implicated in the irregularities. The con-

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nection of defendants with the Hanover bank as its owners and backers had been repeatedly and openly declared over its counter by those in charge to customers and prospective customers and had been advertised in the public press. Numerous persons had told of various things said and done by defendants to the same effect. Whether true or false it had become a matter, at Hanover, of common understanding and belief. The avowals of defendants that this was not only without their authority but entirely unknown to them might well test the credulity of the jury. In addition to this, there is in the case testimony, too lengthy for detail here, of various witnesses as to acts and words of defendants, and each of them, admitting or indicating that they were, with the other directors of the Parma bank, back of and running the Hanover bank. Even after the bank was closed Hunn is shown to have telephoned to Sanderson at Hanover requesting him not to let Burletson go into the bank, and, when asked what authority he would have to keep him out, said, "I give you authority to keep him out; take a club and knock him down if you can't do any other way;" and at about the same time Bullen and Hunn, when seeking to employ the law firm of Wilson & Cobb, of Jackson, in connection with these matters, and being advised the attorneys could not serve them if their interests were antagonistic to creditors of the Hanover bank who had already retained the firm, declared that there would be no questions raised, as they admitted their liability and could not get rid of paying those creditors if they wanted to.

An examination of the testimony of the four defendants in the printed record impresses us that it is tinctured with evasions, contradictions, and an irregularity of recollection which a jury might find difficult to reconcile with frankness or with undisputed facts in the case. All this was for the jury, and the

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witnesses were before the jury whose function it was to determine their credibility. From the record as it reads we are not prepared to hold that the verdict was so against the overwhelming weight of evidence as to call for a reversal.

The judgment is affirmed.

MOORE, MCALVAY, BROOKE, KUHN, STONE, and OSTRANDER, JJ., concurred. BIRD, J., did not sit.

GLASSBROOK v. LANSING WHEELBARROW CO.

1. MASTER AND SERVANT—NEGLIGENCE—PERSONAL INJURIES.
   Testimony that defendant failed to supply customary safeguards for the gearing of its rattlers and to furnish loose pulleys to throw the power off, and that the safeguards could easily and inexpensively have been provided, making it unnecessary for an employee to climb on a barrel to put on a heavy belt by hand, tended to establish negligence, under Act No. 285, Pub. Acts 1909 (2 How. Stat. [2d Ed.] § 4025).

2. SAME—CONTRIBUTORY NEGLIGENCE—PROMISE TO REPAIR.
   Taking the facts as presented by plaintiff's witnesses as true, where plaintiff testified that he did not know of any rule against putting belts on running pulleys, and had been instructed how to put the belts on the rattlers when the machinery was in operation, and had so done for several months, that having become familiar with the danger, he purposed to quit unless the difficulty was obviated, and complained to his foreman who advised him to go ahead, be careful, and use all precautions, and the defects would soon be corrected, he was justified in putting on the belt as he had been instructed to do, and

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was not chargeable with contributory negligence as matter of law, nor did the directions amount to a change or revocation of his previous instructions.[1]

3. SAME.

Whether the danger was so imminent that no prudent person would undertake to perform the service, was a question of fact: knowledge of the danger was not conclusive evidence of want of care on plaintiff's part.

4. SAME—TRIAL—ARGUMENT—CONTRIBUTORY NEGLIGENCE.

Argument of plaintiff's counsel to the effect that a working man was entitled to wear mittens while he was putting on the belt, if counsel for defendant and himself could wear fur wraps and gloves on the street,—being outside the record,—with other remarks tending to enhance the damages and improperly criticising expert testimony introduced by defendant, was prejudicial and erroneous, where the verdict rendered was large in amount, over $6,500, and where the court in his charge instructed the jury to decide the matter "as it actually affects you."

Error to Ingham; Collingwood, J. Submitted April 9, 1913. (Docket No. 21.) Decided September 30, 1913.

Case by Ellis Glassbrook against the Lansing Wheelbarrow Company for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed.

Rollin H. Person (C. W. Nichols and *Harry A. Silsbee,* of counsel), for appellant.

Gardner & Hood (C. P. Black, of counsel), for appellee.

[1] On the question of attempting dangerous work in obedience to orders, without fully appreciating the danger, see note in 4 L. R. A. (N. S.) 838. The question whether servant's assumption of risk in continuance of work after promise is contributory negligence, as matter of law, is treated in a note in 40 L. R. A. 786. And for effect of promise where danger is great and imminent, see note in 29 L. R. A. (N. S.) 598.

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STEERE, C. J. This case comes here by writ of error to review a verdict and judgment obtained by plaintiff on a second trial, in the circuit court for the county of Ingham, wherein he was awarded $6,500 damages for permanent injuries to his right forearm; that member having been drawn between a belt which he was adjusting and its pulley.

Defendant is a manufacturing corporation organized under the laws of the State of Michigan; its business being the manufacture of wheelbarrows, trucks, and various other articles, for which purpose it owned and operated an extensive plant in the city of Lansing, Mich., equipped with power and machinery. As part of its outfit it operated a foundry, woodwork shop, steam boilers, engines, machines, shafts, belts, pulleys, and appliances, and used steam and electricity as motive power. In connection with its foundry it had and used a rattling room 8x20 feet in size, in which were located two rattlers, separated by a board partition running north and south, which divided the space about equally between the two.

A "rattler" is a mechanical device of about one ton weight, driven by power; its object being to smooth and free metal castings from adhering molding sand. This is accomplished by putting the rough castings into a cylinder about 2½ feet in diameter and 6 or 8 feet in length, formed of heavy metal slats or staves, fastened at the ends to flat circular metal heads, and revolving the same rapidly. Plaintiff, when injured, was in defendant's employ, operating said rattlers.

Plaintiff was 40 years of age at the time of his injury and had been intermittently in the employ of defendant and its predecessors in the same business for about six years, during which time he did various kinds of work, such as putting up scrapers and working on different kinds of trucks, wheelbarrows, and spring tooth harrows, also operating at different times both a punch press and a drill press. After

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six years of such work he spent some two years on his own farm, returning to the wheelbarrow company in October, 1908. He was put at work on the "rattlers" in question, at which employment he continued until his injury on January 6, 1909.

To the outer side of each metal head of these rattlers was firmly attached a short metal shaft, or axle, one foot in length; said axle passing through wooden boxes which supported the rattler in a horizontal position three feet above the ground, there being no other floor. The two rattlers were set in a row lengthwise, practically east and west in the rattling room. One axle attached to each rattler was connected by a pinion wheel to a countershaft at the south side of and a little behind each. Both countershafts were provided with a tight pulley and connected by a 9-inch leather belt with a corresponding tight pulley on a line shaft which passed through the rattling room in an easterly and westerly direction, and were supported by boxing at a height of 8 feet above the ground, a little to the north and 8 or 9 feet from the countershaft. The pulley on the line shaft and the belt connecting the same with the countershaft were above and in close proximity to the pinion wheels. The line shaft which operated the rattlers was propelled by an electric motor in the cupola room, close to the wall separating that room from the rattling room; the motor was stopped and started by a rheostat upon which was a little lever, pushed from one notch to another in applying or taking off the power. The line shaft, as a rule, ran continuously, and the rattlers were stopped and started from time to time as they were loaded and unloaded; it only taking about an hour to put through a charge of castings. The rattlers only ran when connected to the line shaft by the belting referred to, and this was put on and off as occasion demanded. The belting could be, and generally was, put upon the pulley while the

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line shaft was in motion. In order to reach and make this connection, whether the shaft was in motion or not, it was necessary to climb up from the floor upon something, and a heavy oak kerosene barrel was kept on hand for that purpose, which always stood in such a position underneath the shaft that a man standing upon it could with his hands put the belt upon the pulley. It was while doing this that plaintiff was injured. His duties as an operator of the rattler consisted largely in filling and emptying the same; about a ton of new castings being put into the rattler at a time, shut in by a wooden cover to prevent spilling when in motion. It was necessary for the rattler to be stopped while being loaded, and each time it was started the belt had to be adjusted to the pulley on the line shaft.

Plaintiff's declaration, consisting of two counts, charges defendant with negligence in failing to provide loose pulleys for the shafts and countershafts operating the rattler, and in not providing the gearing with proper safeguards, as required by statute; in providing an old, spliced belt with wire lacing which at times formed hooks, as it became worn and broken, which were liable to catch the hands or clothing; that the wooden boxings of the axle of the rattler, to which was attached the pinion wheel connecting the rattler with the countershaft, had been allowed to become worn or loose and the axle or shaft to settle, so that plaintiff was required to greatly exert his strength in putting the belt on the pulley; in not providing plaintiff with a safe place in which to perform his work, nor proper and suitable tools and appliances, furnishing him only a barrel to stand upon when putting the belt on the pulley, which was rendered more difficult by reason of sagging of the shaft, the barrel being unstable and liable to tip over and throw the plaintiff into the gearing. It is also alleged that

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plaintiff complained of the machinery being out of repair, and the place unsafe, to defendant's superintendent, who promised to remedy the same but failed to do so before plaintiff was injured; that while plaintiff, in the performance of his duties, was standing upon the barrel endeavoring to place the belt upon the tight pulley on the line shaft while the same was running, as he had been instructed to do, the wire hooks formed by the broken splicing caught the mitten upon his right hand, it being necessary to wear mittens owing to the weather being extremely cold, and, in jerking away to free his hand and avoid being thrown upon the pinion wheels, the barrel tipped, causing him to fall in such manner that his right forearm was drawn between the belt and pulley and crushed. Defendant pleaded the general issue.

The errors alleged and relied on, and the propositions contended for by defendant in its brief, are, generally stated, that plaintiff was guilty of contributory negligence as a matter of law, and the court erred in not directing a verdict for defendant under the undisputed facts; that there is a fatal variance between material allegations in the declaration and plaintiff's own testimony; that various statements were made and language was used by counsel for plaintiff in their argument which amounted to prejudicial and reversible error; that the court erroneously refused certain of defendant's requests and erroneously gave certain instructions as to contributory negligence and the rules by which the jury should be governed in weighing evidence.

The rattlers were old and had been in use for many years. That safeguards were not provided for the gearings, nor loose pulleys for the shafting, to throw the power on and off, is not disputed. Defendant's own witnesses testify that dead or loose pulleys for applying and throwing off the power could have been easily and inexpensively provided. That this would

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avoid the time, labor, and risk involved in climbing upon a barrel to put on by hand what defendant's witnesses say was a heavy belt is undisputed. The reason given by defendant for not doing so is that it would be impractical as the sand would wear out the loose pulleys. Section 15, Act No. 285, Pub. Acts 1909 (2 How. Stat. [2d Ed.] § 4025), provides:

> "All gearing or belting shall be provided with proper safeguards, and whenever possible machinery shall be provided with loose pulleys."

According to his own testimony, plaintiff knew the dangers and was sufficiently familiar with the machinery to understand just what should be done to make it safer. He testified that, about two weeks, and not more than a month, before the accident, he went to the superintendent of the plant and made complaint of what he regarded as avoidable dangerous conditions, pointing out that the gearing was unguarded; that, instead of getting up on a barrel and lifting the belt to put it on by hand, loose pulleys should be provided, as a matter of convenience and safety; that he also stated the boxings and pinions were worn so that the machinery sagged, making it more difficult to put on the belt, which was spliced and more dangerous to handle, and said that if safeguards were not provided as he suggested and the rattlers were not fixed up he would quit; that the superintendent then promised to put on loose pulleys and make the other repairs as soon as the repair man finished a job he was then on, and requested plaintiff to continue with his work in the meantime, to be careful and use all possible precautions and do the best he could, in view of which promise plaintiff consented to remain. This is denied by the superintendent, who testified that no such complaints were ever made, and that there was no conversation on that subject between them. Plaintiff continued with the work until his injury, with

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knowledge of existing dangers and the risks involved, according to his own testimony.

It is plaintiff's claim and testimony that when he began work on the rattlers he was shown, by an experienced employee called for that purpose by the foreman, how to operate the machinery and do his work, and was instructed to put on the belt while the pulley was running in exactly the manner he was attempting to follow when injured; that he had later been reprimanded by the superintendent for having the motor stopped and started to put on the belt; that after he was instructed at the time he commenced work, which was the first time he ever saw a rattler operated, he put the belt off and on both rattlers "an average of about six times a day," and the pulley was rarely stopped for that purpose; that he was not only instructed to put the belt on while the pulley was running, but the foreman and superintendent saw him at his work and were familiar with his manner of doing it. This is denied, and defendant's evidence, by those who instructed plaintiff and worked over and with him, is that he was instructed not to put the belt on a running pulley but to always have the man in charge of the motor stop the machinery for that purpose; and that such was a general and well-known rule of the plant.

The weather was severely cold the day plaintiff was injured, and it was necessary for him to wear mittens at his work. He had them on when injured. This is charged as contributory negligence. Various witnesses who had worked around machinery and put on and off belts, or had seen it done, testified conflictingly on this subject. Some testified that it was improper, dangerous, and an increased risk to put a belt on running machinery with mittened hands; others testified that it was as safe or safer to use mittens, such as plaintiff wore, when putting on a belt, as they prevented the hands from being "burned" or injured;

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that if, by mishap, anything was caught, the mittens would catch first and, being loose, would readily slip off and save the hands.

No one else was present when plaintiff was injured. The appliances and conditions were the same as they always had been while he was engaged in that employment and daily putting the belt on and off without accident, except, as he testified, the machinery was getting older and worse from day to day, and it was an exceedingly cold morning. He stated if it was a cold morning the belt would slip. A model of the machine was present at the trial. His testimony, as it appears in the printed record, indicates that he referred to this model and with it illustrated the accident when giving his evidence before the jury. The material parts of his direct testimony on the subject are as follows:

"When I got hurt I was putting on the belt after I had filled the rattlers. The belt that he told me to stop monkeying with propelled the machinery, stopped and started it. * * * When I got hurt I got up on the barrel to put the belt on, and I tried two or three times, I think, to put it on. I would have to get the pieces of the belt over here back again and sometimes it would run off of that large pulley below, and then I would have to get down and put it on over again and then get back up on there again and try to push it up there again, and I finally succeeded in putting it on and during the time the lace catched my mitten, I think, and I kind of yanked back and when I drew myself back the barrel kind of tipped to the north and I lost my balance and was going down towards the rattler; belt went on; and when I started to catch myself from going that way I throwed my arm between the belt and the pulley. * * * In putting on the belt I placed the patched pieces over on the opposite side, the upper side, to get them as far away from me as I could so if the belt slipped on the pulley it would not be apt to catch me. I did that that morning. My arm was drawn up over the pulley; my arm went right in; I drew myself back; it drew me right in like that."

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While in a long and grilling cross-examination plaintiff made some modifying concessions and more or less contradictory statements as to details, we think it can fairly be said he adhered in substance to this account of the accident. He was somewhat contradictory as to which hand he used at the pulley in adjusting the belt but finally testified it was the right. He explained and illustrated at length the method of putting on the belt as he had been in the habit of doing, and as he claimed he had been instructed, and testified he did it that morning as usual—

"Just as I always put it on. * * * I could not say which one of my hands the hooks caught; it was done quick; it might have caught this hand, and it might have caught this one; it would not be safe to say. * * * I am just giving my idea about it; I cannot tell just how I stood; when I tipped I tried to save myself; I could not tell how I stood exactly."

He also testified that in doing the work he had in mind, not only the danger of getting caught on the hooks on the belting and placed the patched pieces on the opposite side, but "had the whole thing in mind," and that "the principal danger came from the necessity of putting on that belt and the barrel tipping."

After his injury plaintiff was taken by the superintendent to the office of Dr. Black, whom he says he had never met before, but whose services were evidently satisfactory, as plaintiff stated he was his family physician at the time of the trial. The doctor set the broken bones and dressed the arm without administering an anæsthetic. Plaintiff says he "remained under the doctor's care somewhere about two or three months." The doctor testified that both bones of the forearm were broken in two different places between the wrist and elbow, beginning 2½ inches above the wrist. He described the injury as follows:

"Two bones broken; we call it a double fracture,

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and a compound fracture would be a fracture of the bone and a laceration of the soft part so that it would be a double compound fracture. I could determine that there was a laceration by looking at it, as one bone had protruded, made a small hole in the skin; that is what we call where the skin had been penetrated. * * * There seemed to be; the blood under the skin, quite considerable, would show that there was laceration."

Of the condition at the time of the trial he testified:

"I find that there is not a bony union in one break there. It is sometimes called a fibrous or ligamentous union. * * * There is a difference in the terminance of the union even in cases of fibrous union. * * * If it is a short fibrous union, we have use of the arm to a certain extent. I should call this a very short fibrous union. It seems to be quite firm but slips at times; will move. I think the arm as good as could be expected under the conditions. * * * I think the difficulty of the arm is permanent without an operation, and with an operation it might be corrected and he might lose his arm; it is a problematical proposition."

Plaintiff testified that the injury caused him much suffering and loss of sleep; that it was nearly a year after the accident before he "could go to work," first going to work for the Olds people ten months or a year after the injury at $2 per day; that he worked at soldering brass and different metals, earning $3 per day, at time of trial, and worked every day; that he was doing piecework before he was injured and made about $3.50 per day; that he could not do strong manual labor since the injury, although by putting a strap around his arm where the bones failed to knit he could drive nails, etc., but "if I drive a tenpenny nail my arm is paining me almost immediately. Anything that causes a jar, it pains." As a result of this accident he has an impaired arm, caused by a fibrous, instead of a bony, union of the broken bone between the wrist and elbow, and a particularly good

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ligamentous union, according to the testimony of his physician. The hand and all joints of the arm are uninjured and no member is gone. Though weakened for heavy work and sensitive to jars, such as driving a tenpenny nail, he has yet a useful arm with which he can work steadily at his present employment at good wages.

Defendant's contention that plaintiff was guilty of contributory negligence as a matter of law is based chiefly upon the claim that his own testimony shows that he wore mittens when putting on the belt, knowing they might be caught by hooks in the lacing; that it was a cold morning and he knew the belt was tighter, more inclined to slip and difficult to put on than usual, thus increasing the risk; that he knew it was a dangerous proceeding at all times to stand upon the barrel and attempt to adjust the heavy belt to the running pulley, and at the same time knew it could be done with comparative safety by stopping the machinery but negligently selected a more dangerous method.

It is undisputed that plaintiff was put to work by defendant in its factory on machinery where no attempt had been made to comply with the statutory requirements before mentioned; the gearing and belting were in no way safeguarded; and no loose pulleys were provided to start and stop the rattlers, which the nature of the work required to be done often. To do this in the performance of his duties plaintiff had to climb and stand upon a barrel several times each day and put the belt on a pulley eight feet above the floor. If the rule of safe place and proper appliances does not make this negligence as a matter of law, it was at least a question of fact for a jury. These were the conditions which confronted plaintiff when he was put at work there, and instructed how to do his work, and under which he could work or quit. He did not control these material conditions. It is his

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claim that he was reprimanded for, and ordered to refrain from, using the slower and more safe method of stopping the machinery each time he put on the belt to start the rattlers. He testifies that the superintendent said to him:

"Those belts have been put on right along without starting and stopping those things so many times a day and they can be yet, and that you fellows who don't know anything about it quit monkeying with it."

In passing upon the claim that a verdict should have been directed for defendant, the facts as presented by plaintiff's evidence are to be taken as true.

Plaintiff testified that he had no knowledge of any rule that belts should not be put on running pulleys; that he was instructed and shown how to put the rattler belts on when the machinery was running and did so openly and regularly several times each day during the three months he was engaged in that work. According to his testimony, he discovered, as he became more familiar with his work, defects and dangers, which he thought could be remedied, of so serious a nature that he proposed to quit if they continued; and he so notified the superintendent, who promised they would soon be corrected, urging him to remain. He testifies:

"Mr. Verplanck says, 'We are rushed for those castings; rushed with this work; go ahead and do the best you can and be careful; use all precautions.' And I did so."

It is urged this was a revocation of the previous order, if made, to not stop the pulley to put on the belt. If any such inference can be drawn, it was not made clear to plaintiff, as it should have been by detailed instructions. He had his previous orders as to how to do this work. He was told to be careful and

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use all precautions, and, as he understood his orders, he says he did so. Incomplete instructions are sometimes no better than none at all. *Martin* v. *Shingle Co.*, 168 Mich. 175 (130 N. W. 614, Ann. Cas. 1913C, 124).

Even though plaintiff knew the danger and had threatened to quit, it was not negligence as a matter of law to continue the work as before for a time, expecting and relying upon a promise of repairs soon to be made. The rule upon this subject is concisely given in *Missouri Furnace Co.* v. *Abend*, 107 Ill. 44 (47 Am. Rep. 425), as follows:

"It is now uniformly stated by text-writers, that where the master, on being notified by the servant of defects that render the service that he is engaged to perform more hazardous, expressly promises to make the needed repairs, the servant may continue in the employment a reasonable time to permit the performance of a promise in that regard without being guilty of negligence. * * * He may recover, unless when the danger is so imminent that no prudent person would undertake to perform the service. * * * The doctrine * * * rests on sound principle and" is "supported by English and American decisions."

Whether the danger is so imminent no prudent person would undertake to perform the service is usually a question of fact. The rule is fully recognized in this State *(Lyttle* v. *Railway Co.*, 84 Mich. 289 [47 N. W. 571]; *Schlacker* v. *Mining Co.*, 89 Mich. 253 [50 N. W. 839]), and very strongly stated in the latter case. Knowledge of danger which one has failed to avoid is not conclusive evidence of negligence. *Roux* v. *Lumber Co.*, 85 Mich. 519 (48 N. W. 1092, 13 L. R. A. 728, 24 Am. St. Rep. 102).

Many of the foregoing material facts testified to by plaintiff are strongly controverted, and a review of the evidence, taken as a whole, gives the case a different coloring from that indicated by bare recitals

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from his testimony, but we are convinced that the conflicting testimony renders plaintiff's contributory negligence a question of fact within the province of the jury, to be decided by the jury under appropriate instructions.

Serious complaint is made of certain portions of the argument of plaintiff's counsel to the jury, in which it is claimed unfair and unchecked appeals were made to the sympathy and prejudices of the jury. Some of the matters objected to are as follows:

In speaking of the use of mittens while putting on the belt, counsel said:

"It is a funny thing if Brother Nichols and I can go down the street clothed in our long fur wraps and with our gloves on, and the workman cannot have a canvas mitten on to work."

This appeal to the masses against the classes appears to be entirely *dehors* the record. We have searched the record in vain for a word of evidence as to the length and quality of the fur wraps and gloves of the gentlemen mentioned and find no intimation even that they ever owned any such articles of wearing apparel.

In discussing the question of damages, counsel said:

"He may lose his life some time in the future because he is not able to use what would have been a good right arm to protect himself with. He may not be able to protect a child that belongs to him that would be his duty to do. * * * He is entitled to use that arm for his protection in time of danger, all of those things, and it is for you to estimate as best you can the damage he has sustained."

Of a physician called as a witness by defendant, counsel said:

"No man had the power to tell how much that arm was mangled underneath the flesh and yet Dr. Toles

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wanted to intimate to you that he did. Dr. Toles could have been called upon the stand by us, in my humble judgment, and asked him the question, if he had been our witness, and he would have explained it in our way. Talk about experts— * * * Time and time and time again lawyers everywhere are disgusted with that phase of testimony if they tell the truth. * * * For men like him to come before intelligent men like you knowing more about those appliances than he does and tell you how an injury happened time and time again. It is not fair."

These and other remarks more or less outside the line of legitimate argument were timely objected to and exception taken to their continuance. They were not checked by the court, nor the objections ruled upon, so far as the record discloses, though it appears that at least a portion of them were called to the attention of the court at the time. Neither was the jury either instructed in what manner to regard or to disregard such comments. In concluding its charge to the jury the court said:

"It is your sworn duty to decide this matter as it actually affects you, and after you have so decided and deliberated you will return to this room with your verdict."

In view of other portions of the charge correctly defining the duty of the jury, this might ordinarily be regarded as an incidental and unimportant conclusion of the instructions; but as the last word of the court, following the last argument of counsel in which it was sought, unchecked and outside the record, to affect the minds and arouse the emotions of the jury by appeal to prejudice and sympathy, we are impelled to the view, strengthened by the size of the verdict rendered, that the combined result was inimical to a fair and impartial trial, was prejudicial and reversible error.

The judgment is reversed, and a new trial granted.

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MOORE, BROOKE, MCALVAY, and STONE, JJ., concurred with STEERE, C. J.

OSTRANDER, J. *(dissenting)*. I think no reversible error is made to appear and that the judgment should be affirmed.

KUHN and BIRD, JJ., concurred with OSTRANDER, J.

GERKIN v. BROWN & SEHLER CO.

1. AMENDMENT—DECLARATION—PERSONAL INJURIES—POISONS.
   An amendment of plaintiff's declaration which charged defendant with manufacturing and selling a dyed, fur-lined coat which contained coloring matter deleterious to life and health of the wearer, so as to charge that defendant was engaged in the business of selling at wholesale and jobbing such fur-lined coats, knowing the dangerous or poisonous character of the material used, did not change the identity of the litigants, or introduce a new cause of action, and was a proper amendment.

2. SAME—CONTINUANCE—SHOWING.
   But upon defendant's showing that it was surprised by the proposed amendment, asked for at the trial, that defendant had prepared to meet the charge made in the original declaration to which it was a defense that defendant was not acting as manufacturer of the goods but as a jobber, and that it was necessary to procure evidence which defendant could not obtain in time to meet the case made in the amended declaration, the court should have allowed a continuance over the term; a postponement of four days, shown by defendant's affidavit to be insufficient, was not a proper exercise of the discretion of the court.

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3. SAME—ADJOURNMENT—ADMISSION AS TO TESTIMONY.
Plaintiff's admission that the witness mentioned in defendant's affidavit would give the testimony stated therein, was not a proper basis for denying the application for continuance under Circuit Court Rule 22.

4. NEGLIGENCE — POISONOUS DYES — DELETERIOUS SUBSTANCES — SALES—TORTS—PROXIMATE CAUSE.
Evidence that the plaintiff bought a fur-lined coat, handled and sold by defendant to a local dealer, that he frequently had occasion to turn the fur collar up about his face and neck, that he had never suffered previously from any skin or blood disease, that about two weeks after he commenced to wear the coat he experienced a burning sensation on his face and neck which later developed into serious inflammation and grew better when he ceased to wear his coat, taken in connection with a letter from defendant to plaintiff admitting that some persons were injuriously affected by dyed fur, supported by other testimony of the same kind, warranted the court in submitting the case to the jury on the question of negligence and notice to defendant.

5. SAME—PRIVITY OF CONTRACT—FRAUD, ABSENCE OF.
As a general rule the vendor of an article is not liable on account of his carelessness or negligence to others than the immediate purchaser, for mistakes in the nature or quality of an article, where the thing sold is in itself harmless, so far as the vendor knows, if he has made no false representations.[1]

6. SAME—NOTICE OR KNOWLEDGE OF DANGEROUS MATERIAL.
Having knowledge that dyed furs of the kind defendant sold were liable to cause suffering and injury to the purchasers, even though only a small proportion of persons were injuriously affected, defendant was liable in damages to one who was injured in ignorance of the poisonous character of the furs or dyes.

Error to Livingston; Miner, J. Submitted April 29, 1913. (Docket No. 85.) Decided September 30, 1913.

[1] As to the liability of a manufacturer, packer or vendor to persons not in privity of contract, for injury from defects in article sold, see note in 19 L. R. A. (N. S.) 923.

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Case by Henry C. Gerkin against the Brown & Sehler Company for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed.

Cleland & Heald, for appellant.

Shields & Shields, for appellee.

STEERE, C. J. This was an action of tort, wherein plaintiff recovered, in the circuit court of Livingston county, a judgment against defendant in the sum of $500, as compensation for injuries resulting to plaintiff from wearing a fur-lined coat with a dyed, or blended, collar, which, it is claimed, poisoned his neck, face, and hands, causing him great suffering, and seriously injured his health.

Plaintiff bought the coat, which had on it a dyed muskrat fur collar, on December 13, 1910, from Young Bros., a firm of local retail dealers in Howell, Mich., where he resided. They bought it about a month previous, in the regular course of merchandising, from defendant, a business concern in Grand Rapids, Mich., engaged in jobbing fur coats, robes, blankets, etc., and in manufacturing harness and collars. The local dealers were regular customers of defendant. The coat was sold to them by one of defendant's traveling men, who, it is claimed, represented to them in plaintiff's presence, in their store, at the time he took their order, that defendant manufactured the coat; that it was guaranteed in every particular, was made out of good material, and would give good service.

Exception is taken and error assigned on the admission of testimony as to these representations by the traveling salesman. Plaintiff produced no other evidence that defendant manufactured the coat. Aside from this testimony, the undisputed evidence was clear and positive that defendant did not make the coat, nor know how it was made; had never dyed furs, nor manufactured fur garments, but had pur-

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chased the coat, with others, on the market in New York from Wasserman & Shecket, the manufacturers, who procured the fur ready dyed from a firm of fur dealers.

Plaintiff's declaration, as it stood until both parties had rested their case during the trial, charged, and was framed upon the theory, that defendant was engaged "in the manufacture and sale * * * of blankets, robes, and fur coats, fur-lined coats, and saddlery," and had sold this fur-lined coat, "so manufactured as aforesaid," knowing, when it was manufactured, and when it was sold, that the coloring used and material of which the collar was made were "so poisonous and yet so concealed as to become eminently and necessarily dangerous to the life and health of those wearing the same."

Defendant pleaded the general issue, and its primary defense, to the support of which its evidence was chiefly directed, was that defendant did not make the garment, was not a manufacturer, but a jobber, and bought the article in the usual course of trade, in the eastern market, with no knowledge of how, or, at the time, by whom the fur was dyed.

At the conclusion of plaintiff's testimony, and again after both parties had rested, defendant's counsel moved for a directed verdict in its favor, on the ground that there was no competent evidence to go to the jury on the charge that it had manufactured the coat, or that any injurious dyes were used in its manufacture by defendant, or any one else; in that connection moving that the court strike out all testimony, previously objected to, touching statements by the traveling salesman to the local dealers, to the effect that defendant had manufactured the coat.

In disposing of this motion, the trial court expressed the view that defendant would not be bound by such statements of its agent so far as plaintiff was concerned, he being a third party not participating in

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the transaction in which the representations were made, saying to counsel:

"Under this declaration, as it now stands, I have grave doubts about the plaintiff being entitled to recover, for this reason: that the declaration alleges that Brown & Sehler are the manufacturers. I think, if that question should come before the jury, the court would be obliged to instruct the jury that the evidence is that they are not the manufacturers."

This ruling would, in effect, remove from the case and render unimportant the testimony excepted to, and which it was moved to strike out.

Following this intimation of the court, made after both parties had rested, counsel for plaintiff asked leave to amend his declaration by adding a count charging that defendant was, at the time of the sale, "engaged in the business of selling at wholesale and jobbing fur-lined coats of the description in the two counts in this declaration, knowing that the fur-lined coats were dangerous, contained poisonous and deleterious substances." This amendment was opposed on the ground that it introduced a new issue, and stated an entirely new and different cause of action from the one on which the case had been tried, requiring a different and additional line of testimony not then available, and which could only be obtained from New York, where the fur was dyed and the coat manufactured, and where the necessary witnesses then were; that, the declaration having charged defendant, as a manufacturer, with making this coat and dyeing the fur, proof of such charge was necessary to entitle plaintiff to recover, and proof to the contrary was a complete defense, for which defendant had prepared, and which it had successfully made, and was then entitled to the benefit of; further asking and urging that, if in any event the court in its discretion should hold it proper to grant the amend-

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ment, a continuance over the term be allowed to enable defendant to procure further testimony rendered necessary by such amendment.

After argument the amendment asked for by plaintiff was allowed on April 18th, and the trial postponed until the next Monday, April 22d, to allow defendant to produce further testimony; plaintiff being directed, in the meantime, to put in typewriting, file, and serve the amendment, which had been orally presented by counsel and taken by the stenographer. A copy of said amendment was served upon defendant's attorney on Saturday, April 20th. It charged defendant as a dealer with knowledge, instead of as a manufacturer.

On Monday, April 22d, defendant's counsel presented in proper form a motion, asking continuance of the case over the term for the following reasons:

"(1) After the close of the testimony in said cause, and after the court had announced that he would be obliged to direct a verdict in favor of the defendant, the plaintiff was permitted to amend his declaration so as to require an entirely different defense on the part of the defendant.

"(2) That the defendant is not prepared to make such defense.

"(3) That the defendant was surprised by the amendment to the declaration of said plaintiff.

"(4) That some of the witnesses needed by the defendant to make a defense to the amended declaration reside in New York, and it is impossible to procure their attendance or deposition in time for the trial of said cause."

This motion was based upon and supported by affidavits containing the usual averment of merits, and showing, amongst other things, that in a preliminary correspondence over this contention, had before suit was begun, defendant's counsel took pains to distinctly notify plaintiff's counsel that defendant did not manufacture the coat, and therefore, when plain-

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tiff's declaration was filed charging it as the maker, had assumed and believed such charge was understandingly made, intended, and relied upon; that the defense accordingly prepared to meet that controlling issue, and a motion to amend at the trial was consequently a complete surprise; that every effort had since been made in the time allowed to get the desired testimony by wire and long distance telephone, the services of an attorney in New York being engaged to that end, but owing to the distance between the place of trial and New York it was impossible to have the witnesses before the court in person, or their depositions in time for resumption of the trial as set. The affidavits also stated, in part and in general terms, what it was expected to prove by the witnesses whose testimony was desired, and that, amongst other things, defendant, as a result of recent investigation, expected to prove by the dyer of the fur used in the coat complained of that there were no poisonous or deleterious ingredients used in the dyeing, and the fur was harmless to any one wearing it.

The court denied this motion for continuance, on condition that the plaintiff admit that the dye master, if present, would testify as stated in the affidavit (which plaintiff's counsel thereupon admitted), holding that defendant's attorneys knew or ought to have known that such an amendment was, under the liberal statute of amendments, likely to be made, and should have prepared their case to meet it.

The proposed amendment did not change the identity of litigants nor the form of action, nor, strictly speaking, introduce a new cause of action; it charged that defendant committed the same tort in a different capacity. It was within the scope of section 10268, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 12969), for the court, in its discretion, to allow the same on such terms as were just, and did not ultimately deprive defendant of any essential rights. As the pleadings

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and proofs then stood, it was the opinion of the court that defendant had made good a legitimate, if technical, defense, and a verdict must be directed in its favor; but that, for the furtherance of justice, the amendment should be granted. On granting such motion, it was incumbent upon the court to guard against it resulting in defendant's being put to a disadvantage or denied opportunity for full defense as the pleadings stood after the amendment.

The suggestion that defendant should anticipate and prepare to meet an amendment which nullified a previously good defense loses force under the undisputed showing that plaintiff was fully advised of this defense, and with such knowledge challenged it, by specifically charging defendant with committing the tort as a manufacturer. In view of the time when, and circumstances under which, the motion to amend was made, and the showing in opposition, we think there is substantial ground for the contention that to deny defendant's application for reasonable time to investigate, and opportunity to procure and present such further testimony as it desired to meet the case made in the amended declaration, deprived it of a substantial right. The time allowed did not give defendant opportunity to investigate and procure testimony from New York, the only place where the requisite testimony was available according to the undisputed showing. It was not a second motion for continuance, in which a concession that the desired witnesses would testify as stated in the application is ground for denial, under Circuit Court Rule 22. If defendant, taken by surprise as claimed, was entitled to any time to investigate and procure further testimony, it was entitled to sufficient time and opportunity to get before the court the desired witnesses or their depositions. Where material changes are allowed in the declaration during the trial, which may call for a different line of defense supported by addi-

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tional testimony, it has been said by this court that to proceed or take a continuance is "the usual option" of defendant. *Jennings* v. *Sheldon*, 53 Mich. 431 (19 N. W. 132). The general policy recognized in this State is to allow continuances in such emergencies, wherever surprise is claimed under such conditions as reasonably justify the claim, and when time is asked to investigate and produce further testimony. *Lester* v. *Thompson*, 91 Mich. 245 (51 N. W. 893); *Leonard* v. *Leahy*, 169 Mich. 406 (135 N. W. 335); *Berry* v. *Railway Co.*, 173 Mich. 181 (138 N. W. 1038).

Under the circumstances disclosed and showing made by defendant, it was the duty of the court, having in its discretion granted the amendment, to grant a continuance, either over the term, or for sufficient time to permit defendant to procure the witnesses desired or their depositions. We conclude that upon this proposition a new trial must be granted.

Counsel have discussed in their briefs the underlying principles involved in this case, and, as a retrial must be granted, it seems proper here to give some consideration to the questions which will necessarily arise again.

Plaintiff's right of action is based on the contention that poisonous dyes were used in the preparation of the fur which went into this coat; that defendant knew this, or ought to have known it, and also knew that certain persons wearing the coat were liable to be injuriously affected; that it was therefore its duty to impart such knowledge to the purchaser, which it failed to do.

Plaintiff furnished no proof of how the fur was dyed or what preparations were used. His proof upon that subject is inferential only. His evidence establishes a connection between cause and effect, tending to show that wearing the coat was the occasion of his malady. Briefly stated, his testimony

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shows that he was a strong, healthy man, in the prime of life, engaged in a calling which necessitated his taking long drives in the country in all kinds of weather; that he bought and wore this coat to protect himself from the cold when on such drives, and often had occasion to turn the fur collar up to protect his face and neck; that he never before had been affected with any skin or blood disease; that about two weeks after beginning to wear this coat he at times experienced a burning and stinging sensation on his face and neck, for which he was unable to account, and which later developed into serious inflammation, swelling, and discoloration of his face, hands, and eyes, so severe and distressing as to incapacitate him for work and confine him to his house in misery; that he was treated, unsuccessfully, by local physicians, his condition growing worse until about the 14th of March, when he went to Detroit and consulted a skin specialist, after which he ceased to wear the coat, and grew gradually better from that time on; though not for some time suspecting the cause, he finally remembered and understandingly noted that during January, February, and the fore part of March there was a difference in his condition, depending on whether or not he wore the coat; that previous to this trouble he had no knowledge that wearing dyed fur might be dangerous to the wearer. There was abundant evidence, to go to the jury, tending to show that plaintiff's malady resulted from wearing the coat.

Plaintiff also introduced in evidence a letter written by John Sehler, president of the defendant company, in reply to one from the local dealer who sold the coat to plaintiff, containing the following:

"We have yours of the 16th, and fully note contents. Now, we have had much experience with fur-lined coats with different collars, and about one out of every hundred customers we sell to we find can-

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not wear any kind of a dyed collar, no matter how much it is cleaned."

Sehler, being sworn as a witness, testified that he was in charge of the fur coat department of defendant, had been handling fur coats and fur-lined coats for at least 10 years, and had knowledge as a dealer of at least 10,000 they had sold; that very seldom, but occasionally, complaints had been received from dealers to whom they had sold of certain fur coats making their customers' faces sore, but they did not know the soreness was caused by poisonous or injurious dyes used in coloring the fur; that during the 10 years mentioned something like 20 complaints, or about one in a hundred coats sold, came to them that a coat made trouble; that the coat in question was the only one of those purchased from the firm of Wasserman & Shecket that there was any complaint about; that outside of this case witness never knew of any one who wore a fur coat purchased from defendant being incapacitated or laid up by wearing it; that he possessed no knowledge of any poisonous material being used in dyeing furs, though he had tried to ascertain by inquiry of manufacturers and people who dyed the furs, and could not learn that there was. In answer to questions asked on cross-examination, witness testified as to knowledge and notice in part as follows:

"From the information I derived from the talk of the people who were familiar with manufacturing, handling, and even wearing furs, I learned that some of them had trouble with them. I did not go to any one of the 20 or 25 that had worn our fur-lined coats and had physical trouble from them and inquire of them. I did not make an investigation in a single case where a fur-lined coat of ours was claimed to have injured the purchaser. I did not ever make any arrangement and have an expert physician or expert on skin diseases or troubles investigate any one of those cases that you have just described. I simply

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told them to send in the coat and not to wear it any longer. I did that something like 25 times in the 10 years preceding this 1909. I did all I could to prevent the coats sold by us from injuring people. I went to headquarters, to the manufacturers, and tried to find out what was wrong. I did find out. I found out from everybody that some people simply could not wear dyed furs; that it was their condition. That was the only answer I ever got. I knew that when I sold this coat, Exhibit C, to Young Brothers. I did not notify Young Brothers that I had that information and knowledge, and that in selling that coat they must notify the person that it was a dyed collar. * * * We told Mr. Allen (the traveling salesman) that whenever there was a complaint about the coat to take up the coat and send it in and change the collar."

On re-direct examination witness testified:

"In making this investigation with manufacturers and people who knew the fur business, as to the reason for fur-lined coats causing sore skin with some people, I found out that some people simply can't wear furs that are dyed; that seems to be the common accepted condition, knowledge among the fur trade, that some people, on account of their peculiar condition or the condition of the skin, cannot wear dyed furs. That is the information I got. I would like to add to that, all say that is a rare case; but they do find such cases."

It is the contention of defendant that a verdict should have been directed in its favor on the case as it stood when submitted to the jury, for the reasons that defendant did not sell the coat to plaintiff, and therefore no contractual relations ever existed between them; that no evidence was produced by plaintiff as to the manner of manufacturing the coat and dyeing the fur, or that any deleterious or poisonous chemicals were used in that connection; that no fraud, deception, or misrepresentation on the part of defendant is shown; and that defendant as a wholesale dealer only bought and sold the garment in the

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usual course of trade, not knowing or believing that such apparently harmless article of wearing apparel in common use was, or could be, inherently and imminently dangerous, or that it contained any poisonous or deleterious substance which would injure the wearer.

It is clear in this case that there was no privity of contract between plaintiff and defendant and no implied warranty. Defendant was a wholesaler, buying from the manufacturer, and, in the absence of notice or special knowledge, practically in the same position as plaintiff, the final purchaser at retail, would be when buying an apparently harmless article of wearing apparel in common use; neither would be presumed to know of concealed dangers not naturally to be anticipated.

It is a general rule that the vendor of an article is not liable, on account of his carelessness or negligence, to others than the immediate purchaser for mistakes in the nature or quality of an article sold, where the thing sold is in itself harmless, so far as the vendor knows, and where he has made no false representations. *Davidson* v. *Nichols*, 11 Allen (93 Mass.), 514.

Plaintiff's counsel admit that, in the absence of knowledge by defendant, there could be no recovery, but urge the proposition that, having put upon the market an article which it knew was dangerous to some persons and might prove injurious to whoever ultimately bought and wore it, because the fur was dyed and contained some kind of poison or deleterious matter, a fact not generally known, and of which the garment in and of itself gave no notice, defendant owed the duty to the public and to plaintiff, the ultimate purchaser and wearer, to furnish with such article, when it put it forth, a notice of warning imparting to its customers, for the protection of any of the public to whom they might sell, the same knowl-

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edge, and to the same extent, which defendant possessed.

There was evidence that dyed furs were injurious to some persons, and, where the fur came in contact with the skin, acted as an irritating poison, causing much discomfort and suffering, which, if continued, ultimately produced serious inflammation and malignant sores, ruinous to the health of the wearer; that such was the result to plaintiff, whose suffering was protracted and increased because he did not have, and for a long time was unable to obtain, the information defendant possessed. Sehler, defendant's president, had handled fur coats, dyed and undyed, for many years, and knew that some dyed coats were injurious to some people. Trouble along that line had come to his knowledge so often that he had made an investigation, and complaints of coats he had sold came to him to such an extent that he had adopted a policy in that connection. He knew that the trouble only came from the dyed fur. He did not know what dyes were used or of any test by which to determine what chemicals were used in the dyeing; but he did know that "some people simply could not wear dyed furs," and so adopted the plan, which the traveling salesman was told to observe, to have the coat sent in and change the collar on it for one that was not dyed when a complaint was made, giving the purchaser no preliminary warning, and leaving it for him to make the discovery by the slow and dangerous process of painful experience. Sehler objected to the use of the word "poison," and testifies, on cross-examination:

"I say that I never had heard of any of our collars poisoning the people that wore them. When I put in this letter, Exhibit C, the following sentence, 'We have one case in Otsego where a man was laid up for six weeks on account of having his neck poisoned from a fur collar,' that is what they called it, so I used

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their language. In the other cases the language was that it made the customer's neck and face sore; that I do remember. I don't remember ever the word 'poison' being used. * * * In that letter, when I stated that one in one hundred of our coats made trouble to somebody, I referred to fur-lined coats only."

What percentage of these had undyed collars is not shown.

Dr. Biddle, the expert on skin diseases, whom plaintiff finally consulted, and on whose advice he discontinued wearing the coat, testifies, on cross-examination by defendant's counsel:

"I couldn't say and I haven't any idea the proportion of people who wear fur coats that are troubled with this irritation; but in my line of work we see cases occasionally. It is not very many, but still we see them; not more than half a dozen people or so affected with poisoning from furs come in to consult me during the course of a season, that is, that I could trace directly to the furs. * * *

"*Q.* How do you account then, Doctor, for the fact that some people are able to wear dyed furs without any difficulty and others not?

"*A.* We account for it in two ways: One is a possibility of there having been something in the manufacture of that particular coat or the dyeing of that particular coat which has not been—I don't know whether it is a different dye used or something else that has not removed the irritant. That is one. Then the other one is the manner in which the collar is worn. For instance, a man turns down his collar, didn't turn it up on his face, might wear a fur coat for a long, long while, never have it; if it comes a cold day, turns his collar up, might get that, so it depends a good deal on the condition of the coat and then also the manner of wearing it. Some people wear fur coats without ever turning the collar up; that class might wear a fur-lined coat for a winter without having any trouble. The irritant must come in direct contact with the face. * * * It is my opinion that it is the quality of the dye used and the condition

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of putting it on the coat, in the individual coat, that causes that irritation."

It is the common understanding and a reasonable presumption that a fur coat is a harmless thing, free from suspicion of hidden dangers to any one, and the testimony shows that this is true in fact in all cases where the fur is not artificially colored; but it is shown that, if the fur is dyed, in certain cases some coats are imminently dangerous to the health of some persons, when used for the purpose for which they are manufactured and sold.

When the fact is once established and demonstrated by experience that a certain commodity, apparently harmless, contains concealed dangers, and when distributed to the public through the channels of trade and used for the purposes for which it was made and sold, is sure to cause suffering to, and injure the health of, some innocent purchaser, even though the percentage of those injured be not large, a duty arises to and a responsibility rests upon the manufacturer and dealer with knowledge, to the extent, at least, of warning the ignorant consumer or user of the existence of the hidden danger. Failing to do so, the dealer, as well as the manufacturer, who has the knowledge and does not impart it, is liable to a subsequent, ignorant purchaser, reasonably within contemplation of the parties to the original sale, for injuries sustained through such hidden dangers. This is by reason of the duty the dealer owes to the public generally, which includes all whom it may concern, to give notice of any concealed dangers in the commodity in which he traffics, and to exercise a reasonable precaution for the protection of others commensurate with the peril involved. We think this principle applicable to the case at bar and fairly deducible from the many authorities touching manufacture and sale of dangerous commodities. *Thornton* v. *Dow*,

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60 Wash. 622 (111 Pac. 899, 32 L. R. A. [N. S.] 968), and authorities cited and reviewed in *Tomlinson* v. *Armour & Co.*, 75 N. J. Law, 748 (70 Atl. 314, 19 L. R. A. [N. S.] 923).

That the great majority of persons are safe from the particular danger concealed in the article sold, or that few injuries in fact result from its use, does not militate against this principle when the certain fact of imminent danger to a percentage is established. Many people are immune from the most virulent contagious diseases, and the percentage of injuries to those ignorantly using defective machinery or dangerous explosives, or unwholesome and dangerously adulterated foods, is small in proportion to the number who ignorantly or knowingly use them; but it could not be contended, for that reason, that the person knowingly renting a house or selling clothing which were infected with smallpox, or selling defective machinery, or tainted meats, or dangerous explosives, without warning, to one ignorant of the danger, and who was injured thereby, might escape liability.

Even in that class of cases in which it has been held that the vendor is not liable to those not in privity of contract with him for injuries resulting from his negligence, unless the article was manifestly dangerous, the inference is strong that with knowledge of the danger such liability would arise, even to strangers who were subsequent purchasers.

In *Slattery* v. *Colgate*, 25 R. I. 220 (55 Atl. 639), a dealer, selling to a barber shaving soap which contained an excess of alkali, resulting in injury to the latter's business, was held not liable in the absence of knowledge of the excess, limiting the rule to cases where the defect was not known at the time of the sale.

In *Gould* v. *Woolen Co.*, 147 Mass. 315 (17 N. E. 531), a case in many of its facts quite similar to this, plaintiff showed that she was poisoned in using cloths

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manufactured by defendant and bought of its agent in 1884. An expert chemist and physician, who analyzed the cloth and found in it what he designated as "chrome compounds," stated that the cloth was mordanted by bichromate of potash, which was an irritant poison; that it was the chemical commonly used as a mordant in dyeing woolen cloth; that cloth so dyed might be poisonous to susceptible persons; that this chemical was extensively used in dyeing, and, so far as he knew, no case of poisoning similar to plaintiff's had been published until he published four or five cases in 1886, since which time he had seen several more; that he did not know how poisoning could be effected from the presence of chrome compounds in cloth. Being asked, "Is there anything further developed in relation to this kind of poisoning, other than that some people may be injured, who have a disposition that way, by the presence of this compound?" he answered, "Nothing more than occasionally persons may be injured by it, but the great majority of people not." While not deciding the question involved here, the court in that case emphasized the importance of knowledge as applied to such an issue, and held that plaintiff could not recover because of defendant's lack of knowledge, saying:

"The plaintiff's action was brought on September 22, 1884. According to the testimony of the expert witness introduced by the plaintiff, it had never been shown, until 1886, that any cases of poisoning had occurred like the plaintiff's. For all that appears, the plaintiff's was the first instance of injury that ever was known to arise from the cause alleged in the declaration. All that the plaintiff showed against the defendant was, that it used an article for dyeing its cloths which was the most common mordant used in wool dyeing, which was also used very extensively in dyeing cotton stockings black, which, so far as then known, had never caused injury to anybody who merely handled the cloths, and which the defendant did not know or suppose, and had no reason to know

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or suppose, to be injurious; and, under the circumstances, although there was evidence tending to show that, in point of fact, the plaintiff was injured by merely handling the cloths, this was not a result which the defendant was bound or ought to have contemplated as likely to happen."

We conclude there is evidence of defendant's negligence in this record sufficient to carry the case to the jury, and, as already indicated, that defendant should have been permitted to exercise the "usual option" of a continuance to obtain and present such evidence as it desired to meet the declaration as amended.

The judgment is reversed, and a new trial granted.

MOORE, MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

CLARK v. GUSTIN.

1. DEEDS—COMPETENCY—EVIDENCE—CONSIDERATION.
   Held, that complainant's contention that she was induced to execute a deed of 120 acres of land by fraud and undue influence was not sustained by the proofs; and that the deed was not void for incompetency.

2. SAME—CANCELLATION OF INSTRUMENTS.
   Evidence considered, and *held*, to show performance by defendant of his agreement for the grantor's support and maintenance during her lifetime, made in consideration of the deed.

Appeal from Shiawassee; Miner, J. Submitted April 29, 1913. (Docket No. 121.) Decided September 30, 1913.

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Bill by Adelia Clark against Daniel T. Gustin for cancellation of a deed. From a decree for defendant, complainant appeals. Affirmed.

Thomas Hislop, for complainant.

Byron P. Hicks, for defendant.

MOORE, J. On January 8, 1909, the complainant made a warranty deed to defendant of 120 acres of land. The consideration stated therein is "for and in consideration of the execution of a certain contract bearing even date herewith." The deed contains the following:

"Saving and reserving unto said party of the first part the use of said premises for and during the term of her natural life. Provided always that if said second party shall fail to perform on his part a certain contract made and executed between first party and second party bearing even date herewith, then the estate above conveyed to second party shall cease and said first party shall have the right to re-enter and dispossess said second party and the estate hereby conveyed shall be forfeited, but in case no forfeiture shall be declared by first party during her lifetime the estate herein granted shall become absolute upon the death of first party."

The contract referred to in the deed, omitting the formal parts thereof, reads as follows:

"Witnesseth, that whereas, the said party of the first part has this day deeded to said party of the second part, a certain piece or parcel of land situated in the township of Vernon, county and State aforesaid, known and described as follows, to wit: * * *

"And whereas, said first party has reserved in said deed a life estate in and to said lands and has provided for a re-entry and termination of the said estate of said second party, in and to said lands any time during the lifetime of first party, when said second party shall make default in the conditions thereof which condition is the performance of this contract; and providing also that in case said first party shall

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not re-enter or divert or terminate the estate of said second party under said deed during her lifetime, that it shall become absolute at the death of first party.

"Now, therefore it is hereby agreed by and between said parties that in consideration of the execution and delivery of said deed by said first party as aforesaid that said second party agrees to move onto the said premises above described and live thereon with said first party and make a home there for said first party and to furnish said first party with board and care in sickness and in health at any and all times, when she shall choose to be and remain at the home of the party of the second part. Said first party to furnish her own clothes, pay for her own medicine and doctor bills and if during sickness it shall be deemed by the attending physician necessary to have a professional or trained nurse the same shall be procured at the expense of first party who shall be boarded free of charge by second party. Said second party agrees to provide and furnish first party with a tenant for said farm who will work the same as long as first party shall live on the terms one-third to first party and two-thirds to the tenant; said tenant to reside in tenant house on said farm. Said first party agrees that all profits derived from said farm under said arrangement with said tenant shall be expended in improvements on said farm.

"First party shall have the right to insist that second party live in the house on the farm above described, but if the parties hereto mutually agree, they may move into the village of Durand during certain seasons of the year without voiding or affecting any of the other provisions of this contract and the obligation of second party as above provided shall continue the same in such home as though he lived on the farm, but said second party shall not have the right to move off said farm without the consent of first party."

July 29, 1911, this bill of complaint was filed. The prayer is:

"(1) That the said deed be set aside and declared to be void and a fraud upon your oratrix, your oratrix being willing to pay and now here tendering to the

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said Gustin any sum found by said court to be due to said Gustin from your oratrix in the premises, the equities in the premises being considered, and that said contract be declared to have been fraudulently obtained and violated, and that said defendant holds said deed without consideration.

"(2) That your oratrix be restored to her rights in said lands, and that a full accounting be had between the parties hereto, and, if the said Gustin has conveyed or incumbered said farm, that your oratrix may make the parties claiming any interest by reason thereof parties to this suit.

"(3) That your oratrix may have such other and different relief in the premises as may be agreeable to equity and good conscience, and your oratrix will ever pray."

Mrs. Gustin was not made a party to the proceeding.

The case was put at issue and tried in open court. The record contains upwards of 350 printed pages. The trial judge filed a long written opinion, in which he reviewed the contention of the parties. In the decree occurs the following language:

"And the court, being fully advised in the premises, finds that the complainant has failed to prove the allegations of the bill of complaint as to fraud, undue influence, or lack of mental capacity on the part of the complainant to enter into the contract with defendant, that there is not a particle of evidence in the case to show that Dr. Fair or Mr. Hicks had any interest in the case whatever, or that they were in any way governed except by the highest and purest motives.

"Neither does it appear that the defendant has been guilty of any violation of his contract which would warrant this court in setting aside the deed; but the court does find that it was intended by the parties that the property described in the bill of complaint * * * was intended by the parties to be the means of giving complainant her board and good care.

"It is also evident that the litigation between the parties has intensified any feeling that might have

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existed between the parties, so it is doubtful, if the undertaking contemplated by the parties can now be so executed that the complainant would be contented and comfortable in the old home with defendant.

"It is therefore ordered, adjudged, and decreed that the prayer of the bill asking that the deed be canceled should be denied, but that the defendant be required to pay to complainant the sum of $6 per week, commencing from the 1st day of September, 1911, and to continue during such time as she may desire to remain away from the home of the defendant, which sum shall be a lien on the land above described, but that complainant shall have the right at any time she sees fit to return to the home of defendant and live with him in accordance with the terms of the contract. Neither party in this case will recover costs as against the other."

The complainant has brought the case here by appeal. The defendant did not appeal.

Counsel evidently regard the questions involved as those of fact and not as questions of law, for the counsel for appellant quotes no legal authority in his printed brief, and in a written memorandum cites only *Shepardson* v. *Stevens*, 77 Mich. 256 (43 N. W. 918), while counsel for appellee contents himself with citing *Wilson* v. *Wilson*, 160 Mich. 555 (125 N. W. 385).

Mrs. Clark has been in this court before. See *Clark* v. *Ulrich*, 153 Mich. 695 (117 N. W. 329). In that case it appeared that her mother, Huldah More, died at the age of 93 years. When Mrs. Clark went to live with the defendant and his wife, she was 77 years of age. Besides the farm in controversy here, she had another farm of 60 acres, several thousand dollars in the bank, real estate in Detroit, for some of which, whether all or not we do not know, she sold to the school board, since the deed in controversy here was made, for $27,000. She had but one child, a married daughter, whose husband, the evidence tends to show, was in the habit of getting intoxicated.

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The circumstances under which the deed and contract were given are disclosed by one of the witnesses, the material part of whose testimony is as follows:

"Dr. Robert C. Fair, sworn for defendant, testified:

"I have practiced medicine and surgery in Durand for 21 years, having graduated from University of Michigan. I am district surgeon of the Grand Trunk Railway Company and president of Shiawassee County Bank from 12 to 15 years, having succeeded William H. Clark, complainant's husband. Mrs. Clark has been a stockholder all this time. I first became acquainted with her at the time we operated on her daughter, I think, in 1905. My wife and I own a clothing store jointly, and do business as Fair, Gustin & Co. Mr. Gustin has not a dollar invested in it; he works for the firm at so much per week; that is all his relation to the firm. After becoming acquainted with Mrs. Clark, I attended her at different times. * * * I remember being called out to see her in September, 1908, by her daughter. Used to see her once in two or three weeks, and think that time had elapsed from last visit until this time. I had seen her on the 16th of September, five days before. She was suffering considerably from heat and asthma and quite fatigued. Mr. Gustin accompanied me from Durand that day in an auto. I had asked him if he wanted to go out and put up some signs. * * * I left him at the corner at the schoolhouse. Paine lived about 40, 50, or 60 rods from there. * * * I found Mrs. Clark in her room over the dining room, where I had seen her before. It was quite a large room, with the edges of the room cut off, you know, story and half house. Think there were three windows in the room. She complained the room was so hot that she was suffocating, said: 'Doc. Fair, you have got to take me away from here today. I have got to get out of here, or I will die.' I tried to pacify her and tell her to try and quiet down and we would talk the matter over, that we could perhaps arrange for another room downstairs, where it would be cooler. She said, 'No,' that she had tried to get that for a long while back, and Fred and Mate wouldn't give up their room, and they wouldn't let her have

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the large room downstairs. She said she had been trying to get another room; but they wouldn't give her anything, that she had to get out, or she would die that day, and that I had to take her out. I either was to take her to Durand, or take her to Vernon to Howd's, to her farm. * * * I asked her to be quiet, and gave her a powder, and went down to talk with Mr. and Mrs. Paine. * * * I told them what she said, and that she insisted on being taken away, that she either wanted me to take her to Howd's or down to Durand some place. I asked them what the trouble was. Fred said, 'She is having another one of her sprees,' and I don't remember as Mrs. Paine said anything to that; but they both said, 'For God's sake, don't take her to Howd's, for Howd is a scoundrel, and he will beat her out of every cent she has got.' * * * The thought occurred to me of Gustin's people keeping roomers, and he was on the corner. I said, 'Mr. Paine, go down and see Dan,' and he went, and Dan came up with him. * * * When he came, I talked the matter over in his presence. I explained to Dan that Mrs. Clark wanted to go away from there and wanted to go to Durand if she could go, and that I knew of no place to take her on such short notice, and asked if they would consent to take her for a time. He said he couldn't say anything about it one way or the other. 'I could call up my wife,' and if she wanted to it wouldn't make any difference to him; but it would be just as she said. * * * Then I called up Mrs. Gustin. She said she couldn't take her.

"*Q.* Go on and give the conversation you had with Mrs. Gustin.

"*A.* I explained to Mrs. Gustin that Mrs. Clark, who lived at Mrs. Paine's, wanted to come to Durand, get a room, and stay there for a time, and I asked her if she would consent to take her, and Dan was present there while I was talking, and he said it would be just as she said about it. 'Why,' she said, 'Doctor, it would be impossible for me to take her at the present time; my rooms are full, and I have no place to put her.' 'Well,' I said, 'she says she has got to go today, and she has got to go some place; if you can take her for a few days, it would be an accommodation to me to get her some place.' Mrs. Gustin said, 'With that

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understanding, I will take her for a time.' * * * Mrs. Clark had her stuff all packed up, and I went up and told her, and helped her carry it downstairs. Mrs. Paine or anybody else did not go upstairs with me. I assisted her downstairs with her luggage. * * * She went away in a half or three-quarters of an hour after she came downstairs, perhaps an hour. When she left, she was angry and nervous; she was very angry.

"*Q.* Did she remonstrate?

"*A.* Why, she did to me; yes, she told me about how she had been used. She said they had used her like a dog there; they wouldn't give her anything; they wouldn't give her any room that was fit to sleep in, and the room she was in was terrible hot on this particular day. * * * After she got downstairs and got straightened around—by the way, she had spoken to me upstairs about this $900 note which was going to outlaw in just a little while, and she was so angry, she was crying about it at the time; she was going to sue Fred Paine. I said: 'Mrs. Clark, just be quiet and don't let that worry you at all. I will speak to Mr. Paine for you, and I know Mr. Paine will fix it up satisfactorily. There won't be any trouble about it; you won't have to sue him; there won't have to anybody sue him; I will talk to him.' And I did speak to him when I went downstairs; they said they would fix it. I told him if Mrs. Clark owed him for anything, board or anything, to take it out, but get that matter adjusted so she wouldn't be worried about it. After she came downstairs she spoke about it again in their presence. I interrupted and told her I had spoken to them, and the matter would be fixed up; leave it alone, and it would be adjusted before it outlawed; and it was afterwards adjusted, after she was to Gustin's. * * * Nothing was said to Mrs. Gustin about any terms, nothing said as to what she would receive, when I spoke over the 'phone. Mrs. Clark told me why she was leaving when she was up there before she left; because she couldn't get a suitable room, and she didn't like Fred Paine, she said, because he was unreliable and dishonest and was always drinking and wouldn't work her farm for her satisfactorily, wouldn't settle up with her, and all that sort of stuff. She said she had

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offered to give Charlie the farm, and that at one time he talked as though he would do it, and she bought him a team and started to carry out her part of the agreement, and when she asked him about getting some one to go on the farm with her he told her he wouldn't take her old farm as a gift. She told me she had made a bargain with Niver to move down on the farm; he was to live there and work the farm, and she was to give him the farm; she was going to live with him. She told me that before she canceled it. * * * Before September, while I was treating her, she told me she had been trying to get somebody to move onto the farm and take care of her. I tried to get some one for her, but did not succeed. When she left Paine's, I saw Mr. and Mrs. Paine when they parted.

"Q. Describe the parting between her and Mrs. Paine.

"A. When they parted, they simply parted; she did not kiss her mother goodbye. I carried her satchels. She said nothing to Mr. Paine. He said nothing to her. He and I had some conversation. I said I was sorry to see her going away in that mood; * * * that I had done all I could to get her to stay, and Fred said that he didn't care anything about it, he was glad to see the old bitch go. * * * He said she had nagged her husband to death, and had never been able to get along with anybody. After she got to Durand, I saw her the next day. * * * I saw her pretty nearly every day from that time on. In about three weeks she was taken severely sick. * * * I got a nurse for her, who was nursing in Durand. I don't think she was there a week. Before the nurse came and afterwards, Mrs. Gustin took care of her. She was given the large bedroom on the first floor. Her severe illness lasted about a week. I did not see Mrs. Paine; she never came to see her at Gustin's during the first year she was there. She spoke to me about Mrs. Paine not coming there; said it made her feel sad to think that her daughter—that she had been there about a year, and her daughter had never come to see her. After she got over her illness, she spoke to me about a proposition to Gustin's people in regard to the farm. I don't think that was over a week before the deal. She said that she

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was thinking of deeding her farm to Gustin in consideration of their taking care of her the rest of her life, and asked me what I thought about it. She did not at that time tell me of having made other offers; she did at other times; said she had offered it to Mr. Conn. When she spoke of the Gustin deal, she asked me what I thought of it. I said: 'Mrs. Clark, I have helped to get you out of one deal of that kind, and I don't want you to get into another. Take my advice, and don't deed your farm to anybody; you have plenty of money to pay your way. If you like it as well as you say with these people, pay them well; if you get dissatisfied and want to go away, you can go away, then you can come back again, but don't deed your farm away.' She said that was very true, but she might go through the rest of her property or might lose it, and if she made such a deal she would know she would always be protected. I said to her: 'I can only say one thing in regard to it: I advise you not to do it; but I will say, whatever Mr. Gustin agrees to do with you he will undoubtedly do to the letter, because I would trust him with every dollar I have on earth. Mr. Gustin has been in my employ six or seven years; I have known him since he was a boy.' Finally, one day Mrs. Clark told me she had decided she was going to deed her farm to the Gustins on that sort of a basis, and she also wanted to make a will at the same time, and she said: 'Now I want to make a will—make a deed that can't be broken down, because I know that Paine's people will contest it when I am dead, and William Clark would raise right out of his grave if Fred Paine was to ever get a dollar of his money. For that reason, I want to make papers that won't be broken, and I want to know what I have got to do.' * * * She asked me who I would recommend as an attorney, and I told her I would recommend Mr. Hicks, who was attorney for our bank, doing our business, and being honorable and reliable, and asked me to have you call and see her. I was present at the time she gave you instructions in regard to how she wanted her will, and told you to prepare the deed and contract and the will. I was not present when any of them was done, and did not see them previous to their being executed. Her health was fair for her at that time; her mind

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was clear. I think her condition was better then than she is now. From that time on she would have sick spells. Some of them more severe than others. I think this last winter, in January, was the first time I called when she was sick and found her daughter there. She frequently spoke of the kind of treatment she got there at Gustin's.

"Q. What did she say about it?

"A. She said she never knew what it was to have a good home before; that these people had done everything in the world for her, and were doing, and it was no wonder that Mr. Gustin couldn't get ahead in the world, the way he bought stuff. She never made any complaint of not getting what she wanted to eat. Paine's people began to visit her more frequently, beginning the latter part of last January. My recollection is it was after that that I heard of the school board in Detroit making overtures to buy this piece of real estate. I was attending her in January, 1911, and before Mrs. Platt came there she had quite a severe attack of the grippe, and had recovered from that, so that her temperature was normal, and was getting along nicely. After getting along nice for a few days, she was suddenly taken with pain, and became rapidly worse. That was after Mrs. Platt had come there, she was taken so bad. Sunday, towards evening, Mrs. Paine asked me if I didn't think that mother had ought to have a nurse, and I said: 'Why, I kind of thought so last week, because she was very sick; but she is lots better now, and her temperature is normal. If she wants one, of course, it is entirely satisfactory to me. She thought she didn't want one when she was sick the week before.' * * *

"Q. Was Mrs. Clark at that time sick enough to require, in your opinion as her physician, a professional trained nurse?

"A. She wasn't as sick at that time as she was the week before. After she was taken worse, she needed the best care she could get. She was a very sick woman. I couldn't state the date, but a short time after Mrs. Platt came she was taken worse, I think. Mrs. Clark said she thought it was something she had eaten that had made her worse, some green stuff of some kind, I think she said it was. Her lungs were bad, especially her left lung. She has had a chronic

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bronchitis ever since I have had her in charge, a very bad one, and she frequently had acute attacks on top of that chronic condition, associated with asthmatic trouble. I had an examination made, and decided it was not tubercular, and so informed Mrs. Clark. * * *

"I was not interested in any way in the sale of this property, only to assist Mrs. Clark in what way I could, as she asked me for assistance. The first time that I heard about her going out to the farm she telephoned down from Paine's, I think, to Dan. He was out when I answered the 'phone; I happened to be in the store. She said she wanted to talk to Dan, and wondered if he was about ready to go out on the farm; that was the first time they went to the farm —the second year that she was at Gustin's I think it was, along towards fall. I called Dan and heard him talk. He said that he had just got ready to go on his vacation—I always gave him a vacation, and have him draw his wages—and that he and his wife had decided to go to Toledo the next day; but he said, 'Grandma, if you want to go to the farm, we will put off the Toledo trip and stay.' I couldn't say how long after that it was before he moved out to the farm. * * * I heard a conversation between Mrs. Clark and Dan in regard to going to the farm during her sickness in the spring of 1911, in the bedroom, along the latter part of March, I think. She said to me that when she got well, as soon as she was able, she wanted to arrange to go out to the farm this spring and stay there all summer.

"*Q.* Was Dan present at that time?

"*A.* She said, further, she wondered if Dan would be ready to go, and I asked her if she had said anything to him about it; she said she hadn't. I said, 'Let's call him in and have an understanding, so when you get ready to go there won't be any question about it.' And I called him in, and stated to him that 'Mrs. Clark wanted to go on the farm as soon as her health would permit, and she wants to know if you will be ready to go.' And he said, 'Certainly, grandma, I am ready to go any time, if you will give me a few days' notice so we can pack up; you give me 10 or 12 days' notice, and I can get out there any time, maybe on

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shorter notice.' He said, 'I would be glad to go any time.'

"Q. At that time what was her condition as to being sick or well?

"A. She was confined to the bed until she went away; she got up out of bed when she went away. I saw her that day she went away. I had a talk with her about how it happened that she didn't stay at the farm when they were out there, and she told me she didn't intend to stay any longer than when it began to be cold weather, she wanted to go back to her fire, to furnace heat, and be handy where if I was called in the night, had a bad attack, she could get me."

The testimony of the complainant as to the essential things does not differ materially from that of Dr. Fair. Soon after the last talk with the doctor, the complainant, without giving any considerable notice to the defendant, went to the farm with the nurse. This was after dinner on the 9th of May, 1911. Mr. and Mrs. Gustin at once packed their household furniture and went to the farm on the morning of the 11th of the same month, completing the moving on the 13th. Without any trouble having arisen after complainant went to the farm, the complainant left the farm July 27, 1911, saying to the defendant and his family that she was coming back, but instead of going back she commenced this litigation two days later.

It will be noticed upon a reading of the deed and contract that by their terms Mrs. Clark was parting with nothing in her lifetime; Mr. and Mrs. Gustin were receiving nothing in the way of an income from the farm or from Mrs. Clark.

It would profit no one to go into the details of the testimony. A careful reading of the record convinces us that Mrs. Clark first proposed this contract, without it being suggested to her by Mr. and Mrs. Gustin, or any one else, and after she had proposed like contracts to other people. She was entirely competent to make it. The terms of the contract are such that

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it cannot be said that it was an unconscionable contract.

The record convinces us that for nearly three years Mr. and Mrs. Gustin, with as little friction as could be expected, in good faith carried out their part of the agreement and have always been ready, and are still ready, to carry it out.

Upon this record no court would be justified in setting aside this deed. The defendant has not appealed, so that the part of the decree in relation to the weekly payments is not open for review.

The decree is affirmed, with costs.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

TOLEDO, SAGINAW & MUSKEGON RAILWAY CO. *v.* PETERS.

1. BILLS AND NOTES—BONDS—GOOD FAITH OF HOLDER—EVIDENCE—INJUNCTION—BURDEN OF PROOF.

   In a suit to enjoin the enforcement of a railroad bond that defendant claimed to hold in due course, the burden rested on complainant to show that defendant was not a good faith purchaser: evidence that the entire issue of bonds, of which the one held by defendant was a portion, had been recalled, canceled, and destroyed by fire, was insufficient to impair defendant's title.

2. SAME—PRESUMPTIONS.

   It is presumed that the person presenting a negotiable bond is a bona fide holder, and until evidence is introduced tending to show that it was lost or stolen before

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he acquired it, or that the consideration for the instrument was illegal, or that the issuance or transfer was induced by fraud, no obligation rests upon him to prove that he is a holder in due course.

Appeal from Wayne; Mandell, J. Submitted April 22, 1913. (Docket No. 107.) Decided September 30, 1913.

Bill by the Toledo, Saginaw & Muskegon Railway Company against Charles Peters for an injunction to restrain an action at law on a negotiable instrument. From a decree for complainant, defendant appeals. Reversed.

L. C. Stanley, for complainant.

George W. Bates, for defendant.

MOORE, J. This bill was filed to enjoin the prosecution of a suit brought to recover upon seven interest coupons amounting to $225, which coupons were attached to a railroad bond for $1,000. Said suit was commenced in April, 1908. From a decree in favor of the complainant, the case is brought here by appeal.

Stated in the narrative form, the averments of the bill are, in substance, that in November, 1886, the complainant issued 1,600 bonds of $1,000 each, secured by mortgage, said bonds bearing 6 per cent. interest, payable semi-annually, the interest payments being evidenced by coupons, said bonds being due November 1, 1926; that in 1888 they were delivered to W. V. McCracken & Co., who had the contract to build complainants' road for the purpose of paying them for the labor and material in building the road.

"Your orator is informed and believes that said McCracken & Co. did not sell or dispose of any of said bonds and did not sell or dispose of bond No. 1401, hereinafter mentioned, or any of its coupons, with

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the possible exception that said McCracken & Co. did pledge some of said bonds, what bonds your orator is not now informed; but your orator is informed and believes that if any were so pledged, they were redeemed, together with all coupons, and that shortly before the 9th of August, 1888, said W. V. McCracken & Co. were in possession of said entire issue of 1,600 bonds, including bond No. 1401, hereinafter mentioned, and all coupons pertaining thereto."

It is averred: That an arrangement was made by which these bonds were all to be canceled and an issue of 5 per cent. bonds made to take the place of them. That they were all taken to New York and burned, as complainant believed, and, after that fact was established to the satisfaction of complainant and the Grand Trunk Railway Company of Canada, 1,734 new bonds of $1,000 each, bearing 5 per cent. interest, were issued, and 1,560 of them were delivered to W. V. McCracken & Co. in lieu of the 1,600 bonds before mentioned and the remainder delivered to the Grand Trunk Railway Company of Canada. That complainant rested in the belief that all of said first issue of bonds had been destroyed, until April, 1906, when a firm of brokers in New York demanded payment of the interest coupons on bond 1401, which bond was later sued as before stated; that other coupons will be sued and perhaps the bond itself.

An averment is made that complainant has a defense in equity for several reasons, the last of which is stated as follows:

"Because under all the circumstances the said bond 1401 could not now be in existence except for some fraud on the part of some of the clerks of said trust company in handling them at the last when they were being counted or being taken to the said furnace for destruction by burning, or else could not now be in existence except for an accidental loss of the same, or purloining of the same, or other fraudulent means, of which your orator has no knowledge."

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Then followed a prayer for an injunction and for general relief. Accompanying this bill of complaint was an affidavit of the taking of the first issue of bonds to New York, and their delivery to a trust company for cancellation.

"That deponent delivered into the hands of the aforesaid the bonds so carried by him, and they were counted from deponent's hands and found to be the complete lot of 1,600 bonds as aforesaid, with all coupons. That after being so as aforesaid counted and checked by the said officers of said company or by clerks of said company, and in the presence of deponent, they were carried down to the furnace in the basement of the building wherein were the offices of said trust company (that is to say, from the ground floor to the basement one story below), being carried downstairs by one or more clerks of said trust company, and were there in the presence of deponent and said clerks burned in said furnace; that to the best of deponent's knowledge and belief the bond 1401 mentioned in said bill was then and there burned with the rest. And deponent believed it to have been so burned under his eyes and in his presence until the year 1906, when he learned of the claim being presented against said railway company by one claiming to hold said bond 1401.

"Deponent further states that the only explanation he can give for the said bond 1401 not having been destroyed, if it was not destroyed with all its coupons, is either that it escaped from the fire and went out at the chimney in the draft and was picked up by some one who had no right to it and thus got to the hands of the present holder, or else that it was purloined by one or more of the clerks taking it to the furnace to be burned."

The defendant answered the bill of complaint and among other things averred:

"But the defendant alleges and so states the fact to be that the said bond No. 1401 was not so destroyed, and that the same had been negotiated and subsequently came into the hands of defendant who is now the bona fide holder and owner of the same for

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value. * * * That the defendant admits that the said complainant will not be able to show that either said bonds, including bond No. 1401, or any of said coupons were not signed by or on behalf of the said complainant; that the defendant submits that the reasons contained in the eleventh paragraph of said bill as a defense in equity to the rights of this defendant to recover in the said action at law now pending are wholly ineffective and insufficient, and that as a bona fide holder of said bond No. 1401 and the coupons thereto attached for a good and valuable consideration paid therefor he has a legal and valid right to maintain such action and recover therein the amount due on said coupons, and that by reason of the same the said complainant cannot successfully defend the said suit at law now pending against it.

"And the defendant also submits that the facts set up by the complainant in its said bill so disclosed and that all and every matter mentioned and complained of are matters in respect to which said complainant is not entitled to any relief from a court of equity, and this defendant hopes that he will have the same benefit as if he had demurred to the said bill of complaint."

A hearing was had in open court, and the first witness produced the discharged first mortgage and a letter from the trustee, reading as follows:

"DETROIT, Aug. 1, 1888.

"THE AMERICAN LOAN & TRUST COMPANY, OF THE CITY OF NEW YORK.

"*Gentlemen:*

"The undersigned are trustees in a mortgage executed by the Toledo, Saginaw & Muskegon Railway Company, bearing date the 2d day of July, 1888, and in the bonds secured by the mortgage in the amount of $1,734,000. It appears that a prior mortgage to this was executed by the railway company to you as trustees, to secure an issue of bonds, dated November 1, 1886, in the amount of $1,600,000. The bonds under this last-named mortgage, it is said, have not been sold, but have been pledged as collateral security for money loaned. It has been arranged between the railway company and W. V. McCracken &

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Co., who own the bonds issued and outstanding under your mortgage, that these bonds shall be retired by the substitution of bonds issued under the mortgage in which the undersigned are trustees. This has been duly authorized by resolutions of the board of directors of the company, and will be sanctioned by the written authority of McCracken & Co., which will be given to you. To effect such retirement, $1,560,000 of the bonds of our mortgage are available, and are to be placed in your possession concurrently with this letter, but on the following conditions and understanding, to wit: That you are to use the bonds ($1,560,000) to retire and secure possession of all the bonds of your mortgage issued and outstanding. Having thus retired and secured possession of the bonds last named, you are to cancel them in the presence of at least one of the undersigned and at once destroy them. You are thereupon to execute a discharge of said mortgage of November 1, 1886, and have the discharge duly recorded in the several counties into or through which said Toledo, Saginaw & Muskegon Railway runs. The remainder of the $1,560,000, if any shall be left in your possession, are to be delivered to W. V. McCracken & Co.

"Concurrently with the receipt by you for cancellation of the bonds secured by the mortgage of November 1, 1886, you will receive from W. V. McCracken & Co., certificates of the capital stock of said railway company in the amount of $1,600,000, and the understanding is that you will deliver this stock to said James H. Muir, treasurer, duly transferred as he shall direct."

A certificate from the American Loan & Trust Company was introduced, stating that the 1,600 bonds had been destroyed by fire. Two affidavits of date August 9, 1888, to the same effect were introduced in evidence. The deposition of Mr. Berry was offered. In it appeared the following:

"*Q.* What did you do, if anything, about these bonds about the 9th of August, 1888?

"*A.* They were cremated.

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"*Q.* When, where, and how and by whom were they cremated?

"*A.* They were put in a furnace by Mr. McCracken, the president of the railway company, and myself; that is, we were present when they were put in and saw them burn. * * *

"*Q.* Mr. Berry, what was the issue of these bonds?

"*A.* One to 1,600, inclusive.

"*Q.* What did you do yourself, Mr. Berry, with reference to ascertaining the numbers?

"*A.* Well, the custom always has been to count the bonds one by one, and also count the coupons then belonging to that particular bond. (Mr. Brinckerhoff asked to have answer stricken out as irresponsive.)

"*Q.* Was the process ever done by one person?

"*A.* No, sir; two persons have always done this.

"*Q.* In response to the question, Mr. Berry, what was done on that occasion with reference to the corporation or any other individual.

"*A.* Mr. McCracken, president of the railway company, represented the railway company and was one of the parties who counted the bonds.

"*Q.* In your presence?

"*A.* In my presence, and I call to mind that there was another, a workman, also present.

"*Q.* Of the railway company?

"*A.* I think he was of the railway company.

"*Q.* Was his name Muir?

"*A.* I think it was Muir.

"*Q.* Mr. Berry, do you recall whether I was present?

"*A.* Yes, sir; you were.

"*Q.* Was I the one who brought the issue to the trust building?

"*A.* I do not remember.

"*Q.* Did you say you burnt the bonds yourself?

"*A.* No, sir.

"*Q.* You stood by?

"*A.* Yes, sir."

The deposition of Neil MacDonald was taken. In it appeared the following:

"*Q.* Mr. MacDonald, what was your line of business in August, 1888?

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"A. I was a member of the firm of W. V. McCracken & Co. Our business was railroad contractors and builders. W. V. McCracken, George A. Evans, and Neil MacDonald.

"Q. Where was their office?

"A. Nos. 40 and 42 Wall street.

"Q. What is Mr. Evans' address now?

"A. Mr. Evans is dead.

"Q. Mr. W. V. McCracken?

"A. He is dead.

"Q. What was the relation of that contracting firm to the securities of the Toledo, Saginaw & Muskegon Railway?

"A. W. V. McCracken & Co. agreed to build the road and took the securities of the Toledo, Saginaw & Muskegon Railway Company.

"Q. That was under general contract? Did they perform the contract and build the road?

"A. They built the road to Ashley, Mich., about 100 miles from Muskegon.

"Q. Was that done under a contract to build that much?

"A. As I recall it, the road was to be a little longer, but we took the contract to build the road as far as Ashley.

"Q. Where did you get the securities for the work?

"A. We got bonds and stock of the Toledo, Saginaw & Muskegon Railway Company.

"Q. What bonds did you get?

"A. As I recall it, there was an original lot of 1,600,000 bonds (6 per cent. bonds) that we got.

"Q. You mean by that $1,600,000 of bonds?

"A. Yes.

"Q. Do you remember the date of these bonds?

"A. No, I cannot tell the date, but I think (I feel certain) it was in 1886.

"Q. If it will refresh your memory, was it one of the last months of the year?

"A. I have been looking into the matter and think it was November, but I am not prepared to say, but I can easily find out.

"Q. Mr. MacDonald, what did the firm do with these bonds; I mean to say, as to selling them on the market or otherwise?

"A. These bonds were made away with, or de-

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stroyed, to make way for another issue of 5 per cent. bonds.

"*Q.* The question is whether all of these were made away with?

"*A.* As I recall it, I am certain that I was not present at the time they were made away with to make way for the new 5 per cent. bonds. As I recall the matter, the whole original issue of $1,600,000 6 per cent. bonds was offered to our company for the purpose of building the road above referred to.

"*Q.* Before, after, or concurrent with the building?

"*A.* Before the building. As I was the financial member of the firm, I decided that an issue of 5 per cent. bonds could be as easily handled by me, making, of course, the saving in interest. The original bonds (the 6 per cents.) were then destroyed, as I supposed.

"*Q.* Do you know what the intention of the firm was with reference to their destruction?

"*A.* To make way for the new 5 per cent. mortgage, which would, of course, not be a good mortgage with the original bonds out.

"*Q.* At the time of what you call their destruction, who owned and possessed the $1,600,000 bonds?

"*A.* McCracken & Co., subject to our performing the contract.

"*Q.* On the day when you supposed they were destroyed, to wit, on August 9, 1888, will you state who handled and destroyed these bonds?

"*A.* Up to the time they were destroyed, Mr. McCracken.

"*Q.* Up to that time and from and after getting possession of them, what, if any, sales had McCracken & Co. made of any of these bonds?

"*A.* No part of this issue was ever sold, given away, or loaned.

"*Q.* What would have been the market value or the success in marketing the bonds of that road?

"*A.* As the road was not built, it would be impossible to say. At the time they would not have had any market value.

"*Q.* When were these bonds offered to McCracken & Co. in 1886?

"*A.* As I recall it, the latter part; I think November.

"*Q.* As I understand it, you were directed to sur-

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render the entire loan of bonds in 1888, Mr. MacDonald?

"A. Yes. * * * They were kept in our safe

"Q. How were they kept in your safe?

"A. Perhaps I had better say for the period of time they were kept in the American Loan & Trust Company, in the safe deposit box of the American Loan & Trust Company.

"Q. Were these bonds accessible to any one while in your safe?

"A. As I recall it, they were, Mr. Brinckerhoff.

"Q. You received these $1,600,000 bonds and the stock which you spoke of as compensation for the work to be done under your contract with the railway company?

"A. I would say as consideration; perhaps compensation might do; but as compensation that was all we received for the building of the road. The bonds were ours absolutely.

"Q. Where did you get the funds to build the road under the contract?

"A. Only of these 6 per cent. bonds which were destroyed.

"Q. Did you not do the work under your contract between November, 1886, and August, 1888?

"A. Yes.

"Q. How much work, more or less, did you do during the 18 months?

"A. I think the road was practically completed in that time.

"Q. Where did you get the funds to carry on the construction work?

"A. McCracken & Co. had plenty of money and could get millions on demand.

"Q. You built this road, then, out of your own resources and money which you borrowed?

"A. Yes.

"Q. What was your procedure when you borrowed money to carry on the construction work on this road? How did you go about borrowing such funds?

"A. I suppose you refer to this road when you ask that. They would take the liquid assets, of which we had abundance in the safe at all times, and go out and borrow the money.

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"*Q.* With these securities as collaterals you would borrow money?

"*A.* Yes.

"*Q.* What do you mean, Mr. MacDonald, by liquid assets?

"*A.* Readily salable securities.

"*Q.* Did you use these bonds as collateral securities?

"*A.* According to my remembrance we never used one of these bonds as collateral security.

"*Q.* Would you consider these railway securities as liquid assets?

"*A.* No.

"*Q.* Who had access to these bonds while they were in your safe?

"*A.* Anybody in our firm could have had access to them, but they were in charge of Mr. Pennington, private secretary of Mr. McCracken & Co.

"*Q.* The other members of the firm of McCracken & Co. had access to the safe?

"*A.* There were only two members besides myself, W. V. McCracken and George A. Evans; but, as a matter of fact, the McCracken safe was generally managed by the private secretary and bookkeeper, Mr. Pennington, and if we had occasion to use anything in the safe we would send for Mr. Pennington.

"*Q.* Did any member of the firm have the exclusive duty of raising the money upon your assets to carry on the construction work?

"*A.* I had that exclusive function.

"*Q.* During the summer of 1888, what became of these bonds?

"*A.* The bonds were destroyed in the summer of 1888.

"*Q.* Prior to their destruction what did you do with them?

"*A.* Nothing was ever done with these bonds, as we intended to have them destroyed; they were as so much waste paper. (Mr. Brinckerhoff objected. Asked to have that answer stricken as not responsive. Mr. Stanley objected to its being stricken out as irresponsive.)

"*Q.* What did you do with the bonds when you you removed them from your safe in the summer of 1888?

"*A.* Personally I did not do anything with them.

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"*Q.* Then you have no personal knowledge of anything concerning these bonds subsequent to the time they were removed from your safe?

"*A.* No.

"By Mr. Stanley:

"*Q.* You say that these bonds were never lent by your firm? I will ask if they were ever pledged for loans?

"*A.* Never, according to my remembrance. They were never used in any financial transaction.

"*Q.* When was the plan formed of having them replaced by 5 per cents.?

"*A.* Shortly after our original contract, whatever date that was. * * *

"*Q.* You say that your firm got, of the new 5 per cent. bonds, practically 1,560. Can you not say what the exact amount was?

"*A.* I think it was exactly 1,560. I had 1,560 bonds to deal with.

"*Q.* That you remember?

"*A.* Distinctly.

"By Mr. Brinckerhoff:

"*Q.* Why did you receive 40 bonds less of the new issue than of the old issue which you surrendered?

"*A.* I don't know that I can tell you the exact reason, but, as we were the sole owners of the road, we had it all anyway whether it was 1,560 or 1,600; it was all ours. There was some reason, but I don't seem able to recall it.

"*Q.* Do you mean by that that you owned all the securities—all the bonds and all the stock?

"*A.* We were practically owners of the road and of practically all the stock.

"By Mr. Stanley:

"*Q.* Mr. MacDonald, was this evidence, then, that you took the 1,560 bonds before you had any arrangement for either a deal with the Grand Trunk Railway or any connection with the Grand Trunk, and you took the 1,560 of the new issue under a direct arrangement of some kind with the Grand Trunk?

"*A.* I cannot say as to that; I was what you might call the financial end of affairs, but it was 20 years ago, and I cannot quite testify as to that.

"*Q.* You would not say that it was not the case?

"*A.* No."

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The witness who took the bonds to New York testified as follows:

"Mr. Muir, who has been mentioned, met me at the trust company's office and there was present Mr. ——— and Mr. Berry, whose deposition has been read, and Mr. O. D. Baldwin, whose signature is on Exhibit C. Some one brought in a lot of these bonds that have been referred to as 6 per cent. bonds of the same road, and I remember distinctly going down to the furnace below the office with two or three of the clerks who had counted them, and the janitor had been called up and had been asked to build a fire there, and when we went down there was a fire burning and these piles of pamphlets or bonds were put into that furnace, and then we came upstairs then and I made out for Mr. Muir in my handwriting this Exhibit G, and he signed it, and at the same time Mr. Baldwin delivered to us his signature to Exhibit 6."

The deposition of the defendant was taken. He produced bond 1401. He testified that he was the sole survivor of a firm of New York brokers known as Peters, Schenck & Co.; that the firm went out of existence in 1891, and that he was the owner of the bond; that he received it upon the division of the assets of the firm in 1893 or 1894; that he put it in a box with mining shares that since became worthless; that its existence was overlooked until about two years before the suit was brought. On the cross-examination he testified in part as follows:

"*Q.* Have you any bill of sale of this bond or paper to show sale of this bond?

"*A.* None that I know of. There was an agreement signed by the partners, dividing the assets of the firm equitably. This was in full satisfaction between the partners.

"*Q.* Do you know how your firm became possessed of this bond?

"*A.* I have not the faintest idea.

"*Q.* You don't know who put this bond up?

"*A.* I was not in the bookkeeping department. I

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was a member of the board of exchange and my work was on the exchange.

"Q. Did you ever collect coupons on that bond?

"A. Not that I am aware of.

"Q. Do you know whether the firm did?

"A. Not the slightest idea.

"Q. Is there any one in the city of New York who would know better than you say you know as to who used that bond as margin?

"A. All my partners are dead; my bookkeeper, who had the power of attorney, died five years ago, and my cashier died six or seven years ago, and I am the only surviving one.

"Q. Do you know whether other bonds of this road were put up as margin at the same time?

"A. No.

"Q. Was there any memorandum made between you as partners which recited the assets which were to go to you and the assets that were to go to your partners?

"A. Yes, also a release that was given of the whole matter regarding Peters, Schenck & Co.

"Q. Who divided these assets?

"A. Mr. Schenck and myself, I think.

"Q. At the time of the division of the assets, you took note of the value of each item that went to you and which went to your partner, Mr. Schenck?

"A. Everything had been charged on the books to profit and loss, and when we come to close up, Mr. Schenck said to me, or Mr. Benedict, my bookkeeper (he took principal charge of those matters), and either Mr. Schenck or Mr. Benedict said to me that these things were equally divided.

"Q. Do I understand that you, then, personally did not note the division of these assets, but you left it to your clerk and assistant to do it?

"A. My impression was that Mr. Benedict and Mr. Schenck rendered the account to me.

"Q. Have you that account or release?

"A. I cannot find it anywhere. I think all the partnership papers were destroyed in 1901 when the books were destroyed.

"Q. You refer to this bond as among a lot of assets that were turned over to you and which were regarded as worthless?

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"*A.* The mining stocks which were in the box I regarded as worthless three years ago.

"*Q.* This bond was included in the assets which were turned over to you as worthless?

"*A.* You misunderstand me. I say that the mining stocks I took out and examined three years ago I then regarded as worthless. When the firm expired they were not worthless.

"*Q.* You discovered this bond two or three years ago in a box of assets of your old firm, which assets you had regarded as worthless?

"*A.* They were no longer assets of the firm. They were my personal property. The assets of the firm had been divided, and they were my personal property.

"*Q.* The assets of the firm were divided in 1893 or 1894 and you had not examined this box of assets of the old firm, now your property, between 1893 or 1894 and 1905, had you?

"*A.* I have been to the box several times during that time.

"*Q.* Did you never notice this bond?

"*A.* Not to my recollection.

"*Q.* How has it happened that you produce this bond so long after the time of this dissolution?

"*A.* It was the first time that I had taken particular notice of it.

"*Q.* Had you handled the bonds of this road other than this bond at any time?

"*A.* Not that I know of.

"*Q.* At the time of the division of the assets, I understand you to state that a statement distinct from the release was given, showing what was given to you in the division and what was given to your partners?

"*A.* To the best of my recollection.

"*Q.* I understand that the statement has been destroyed?

"*A.* That is my impression, as I would have found it.

"*Q.* When did you look for it?

"*A.* At the time I first saw those securities there, and I have looked for it since.

"*Q.* Your knowledge of this method by which this bond came into your firm's possession, and the way in which this bond came into your firm's possession, is

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only a surmise that it was probably put up as margin by one of your customers, but which one of your customers you have no means of knowing?

"*A.* No, none at all.

"*Q.* And from the time of the dissolution of the firm when such assets in the division as came to you from the firm were put into this box in 1893 or 1894, until within a couple of years, although you had examined the box and its contents, your attention had never been called to this bond until about two years ago?

"*A.* No.

"*Q.* When were your books destroyed?

"*A.* 1901. Ten years after the dissolution.

"*Q.* Where were they destroyed?

"*A.* Destroyed by Mr. Schenck, down at his house at Lawrence, Long Island. We had a pile of books larger than this desk. They were all destroyed. He asked my consent, and I said, 'Certainly.'

"*Q.* Your recollection of the destruction was that he burned them?

"*A.* Yes.

"*Q.* When was the record of this account between you, as partners, or the memorandum as to the division of assets, when was that destroyed?

"*A.* I can't tell you whether it was lost or destroyed. If it existed, and I am not sure that it did, it must have been in the box. It was not in the box.

"*Q.* When did you last see it?

"*A.* I cannot fix any date of it. It must have been prior to 1900.

"*Q.* Have you any list of your customers?

"*A.* I cannot tell you any, except some of the most prominent ones. We had 600 or 700 names on the books and I cannot tell you the names of the smaller ones.

"*Q.* And you cannot relate this bond and its possession to any one of these customers?

"*A.* I cannot place it at all in any way."

In the brief of counsel for the complainant we find the following:

"It is said that the burden never shifts. In this case the burden of proof is on the complainant to satisfy the court by a preponderance of the evidence

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that it would be inequitable to allow the defendant to recover the amount of the bond and coupons. But when we have shown, as above, that there was no way for this bond to have escaped the fire except by loss or theft or a fraudulent act amounting to theft, we have shown we should have a decree. * * * The holder of a negotiable instrument is not bound to introduce any evidence to show that he gave value for the instrument until the other party has clearly proved that the consideration of the instrument was illegal or that it was fraudulent in its inception or that it had been *lost or stolen* before it came to the possession of the holder, citing Story on Bills (4th Ed.) § 416; Byles (10th Ed.) 119; 1 M. & W. 425; [*Sistermans* v. *Field*] 9 Gray [Mass.] 336. Judge Story said that nothing short of fraud, not even gross negligence, is sufficient to overcome the presumption furnished by possession that the holder is the proper owner and lawful possessor, citing cases. Lord Denman said (1 A. & E. N. S. 498) that it requires fraud, felony, or some such matter to be proved in order to overcome the presumption. The burden of proof against the holder of coupons payable to bearer is on the party who assails his possession [*Ranger* v. *Cary*] 1 Metc. [Mass.] 369; *Smith* v. *Sac County*, 11 Wall. [U. S.] 139, 154. But in this case not only is there no proof of *bona fides* but *bona fides* is inconsistent with (that is, is contradicted by) all the other proofs in the case. Defendant attaches too much weight to the fact that his bond is not destroyed as foundation of the presumption of good faith and a right to sue. That fact is entirely consistent with our theory of a loss or theft, and it helps to make out loss or theft."

We agree with the statement of counsel as to the law of the case.

In Jones on Corporate Bonds and Mortgages (3d Ed.), § 190, the following language appears:

"Although they contain an agreement for their conversion into stock, the coupon bonds of a railroad company, payable to a person named or bearer, are negotiable instruments, with the privileges of such paper; and so, although the bonds contain an agreement on the part of the company to make what is

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termed 'scrip preferred stock' in exchange therefor at any time within ten days after any dividend should become payable on such stock. Such an agreement is independent of the pecuniary obligation contained in the instrument, and does not change the duty of the company with respect either to the principal or interest stipulated. Whether the agreement to convert into preferred stock is of any value or not, it can in no way affect the negotiable character of the instrument; and therefore the title of a bona fide holder is good, although the bonds may have been stolen from the former owner.

"Where it further appeared that to such bonds there was attached by a pin the certificate of such preferred stock, which stated that the bondholder was entitled to a certain number of shares of such stock, and that upon the surrender of the bonds he should be entitled to receive the stock, the bonds having been stolen and negotiated to one who took them without actual notice of any defect in the title to them, the fact that the certificate originally attached to the bonds had previously been detached was held not to be a circumstance sufficient to put the person who took the bonds upon inquiry as to the title of the previous holder. The title of a person who takes negotiable paper before due for a valuable consideration can only be defeated by bad faith on his part, which implies guilty knowledge or wilful ignorance of facts impairing his title; and the burden of proof lies on the assailant of the title."

Section 200 of the same authority reads:

"A purchaser of negotiable bonds before due, for a valuable consideration, in good faith and without actual knowledge or notice of any defect of title, holds them by a title valid as against every other person. Even gross negligence at the time of purchase does not alone defeat the purchaser's title. A purchaser may have had suspicion of a defect of title, or knowledge of circumstances which would excite such suspicion in the mind of a prudent man; or he may have disregarded notices of stolen bonds; and yet, if he has purchased for value in good faith, his title cannot be impeached. Such suspicion, or ground of suspicion, or of knowledge on his part, may be evidence

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of bad faith; but before his title can be impeached his bad faith must be established. It must be shown that he did not purchase honestly. The protection accorded to a purchaser of such bonds extends to the mortgage given to secure them.

"It is a presumption of law that the person presenting a negotiable bond is a bona fide holder, and until evidence is introduced tending to negative that presumption, he is under no obligation of proving himself a bona fide holder."

See *Walnut* v. *Wade*, 103 U. S. 683; *Ottawa* v. *National Bank*, 105 U. S. 342; *Hovey* v. *Sebring*, 24 Mich. 232 (9 Am. Rep. 122); *Hogan* v. *Dreifus*, 121 Mich. 453 (80 N. W. 254); *Massachusetts Nat. Bank* v. *Snow*, 187 Mass. 159 (72 N. E. 959).

Has the complainant so met the rule of law that it should escape liability? The bond was produced before us upon the hearing. It and each of the coupons is payable to bearer. It is conceded it is the original bond. It does not bear the slightest evidence of fire or any trace of any effort to cancel it. The whole of the testimony introduced on the part of the complainant was to show that all of the first issue of bonds were destroyed by fire. The bond itself is a complete refutation of that theory so far as relates to it. The defendant testifies that he is the owner of the bond and gives his explanation of how it came to him. It is unfortunate that so many of the people who knew about the transaction are dead. The statement of the trustees in the letter of August 1, 1888, as follows:

"It appears that a prior mortgage to this was executed by the railway company to you as trustees to secure an issue of bonds, dated November 1, 1886, in the amount of $1,600,000. The bonds under this last-named mortgage, it is said, have not been sold but have been pledged as collateral security for money loaned. It has been arranged between the railway company and W. V. McCracken & Co., who own the bonds issued and outstanding under your mortgage,

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that these bonds shall be retired by the substitution of bonds issued under the mortgage in which the undersigned are trustees"—and the testimony of Mr. MacDonald: "*Q.* You say that your firm got, of the new 5 per cent. bonds, practically 1,560. Can you not say what the exact amount was? *A.* I think it was exactly 1,560. I had 1,560 bonds to deal with. *Q.* That you remember? *A.* Distinctly. By Mr. Brinckerhoff: *Q.* Why did you receive 40 bonds less of the new issue than of the old issue which you surrendered? *A.* I don't know that I can tell you the exact reason, but, as we were the sole owners of the road, we had it all anyway whether it was 1,560 or 1,600; it was all ours. There was some reason, but I don't seem able to recall it"—may have some significance.

In any event, bond 1401, which had been issued to W. V. McCracken & Co., was not destroyed. It passed into the possession of a firm of brokers. Upon the dissolution of that firm it came to one of the members as a part of his share of the assets of the firm. We do not think complainant has established a case entitling him to the relief prayed.

The decree is reversed, and one may be entered here, dismissing the bill of complaint, with costs.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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RAHALEY *v.* DETROIT UNITED RAILWAY.

1. STREET RAILWAYS — CONTRIBUTORY NEGLIGENCE — USE OF STREETS.

   In an action for injuries sustained in a collision between a street car and plaintiff's conveyance, his testimony that he looked both ways and could see no car, that his vision was obstructed at a distance of about 240 feet by vehicles and similar objects, that he believed he could safely cross, but was struck by a car as his rear wheels were clearing the track, that the car ran 650 feet after it struck him and its speed was 40 to 50 miles per hour, presented an issue for the jury as to his contributory negligence.[1]

2. SAME—TRIAL—CHARGE—DUE CARE.

   In charging the jury the trial court erred in omitting to state the duty resting on plaintiff to act as a reasonably prudent man would and to state the degree of care also required of defendant's motorman; the language of the court's instructions being ambiguous.

3. SAME—STREETS—NEGLIGENCE.

   The jury should also have been instructed that additional care was required of both plaintiff and defendant's servant because of the fact that the street was badly torn up and the crossing difficult to make, as shown by the testimony.

Error to Wayne; Donovan, J. Submitted April 22, 1913. (Docket No. 136.) Decided September 30, 1913.

Case by Michael Rahaley against the Detroit United Railway for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed.

[1] On the question of injuries by street car collisions with vehicles or horses, see note in 25 L. R. A. 508.

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Corliss, Leete & Joslyn and *A. B. Hall,* for appellant.

Washington I. Robinson, for appellee.

MOORE, J. The plaintiff recovered a judgment against the defendant for injuries received by him in a collision when he attempted to cross defendant's street railway track. The case is brought here by writ of error. We quote from the brief of appellant:

"In discussing the assignments of error, we propose to classify the assignments under four heads: (1) The refusal of the court to direct a verdict at the conclusion of the plaintiff's case; (2) the error claimed in the argument of counsel; (3) error in the charge of the court; (4) refusal of the court to grant a new trial."

1. Did the court err in refusing to direct a verdict in favor of defendant? Counsel base this claim upon the theory that plaintiff was, according to his own testimony, guilty of contributory negligence. The accident occurred on Woodward avenue in Highland Park, in a thickly settled and busy neighborhood. The paving was torn up on alternate sides of the street every other block, and the street intersections were filled in with loose planks and dirt, making the crossings very rough. The plaintiff was driving a one-horse rig loaded with crockery and glassware. He testified that before attempting to cross the tracks he looked and listened and could see up the street to the next street intersection, about 240 feet, where his further view was cut off by vehicles, including a moving van, which were crossing the tracks at that intersection, and that he saw no car. He claimed he thought he had ample opportunity to get across and that he was nearly over when the rear wheels of his rig were struck.

There is testimony that the car was running 40 or

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50 miles an hour and that it ran 650 feet after colliding with plaintiff before it was stopped. The witnesses for defendant told a different story. We think the testimony offered on the part of the plaintiff made a question for the jury. See *Ryan* v. *Railway Co.*, 123 Mich. 597 (82 N. W. 278); *Chauvin* v. *Railway*, 135 Mich. 85 (97 N. W. 160); *Deitsch* v. *Traction Co.*, 155 Mich. 15 (118 N. W. 489), and the cases cited therein; *Hibbler* v. *Railway*, 172 Mich. 368 (137 N. W. 719).

3. Was there error in the charge of the court? Complaint is made to the following portions of the charge:

"I charge you it was the duty of the motorman to be watchful to see he did not collide in going along the track when others were going over the track.

"I charge you again that the street car tracks form a part of the public highway, and the public have a right even to drive upon the tracks, and they drive upon the tracks repeatedly; and if you believe from the testimony in the case that the driver in this case was exercising reasonable care and caution before he went upon the track, if he looked back to see if the car was approaching before he went across the track as he claims, and, seeing none, he started on the tracks, that he had a right so to do. And then it was the duty of any one who attempted to go on to take notice all the way in that way."

Again:

"I charge you again that, if the highway at the point or location where the collision occurred was obstructed by conditions for any length of time, the defendant would be presumed to have notice of the condition of the highway. That is the torn-up condition, not that the tracks were torn up, but that they required a crossing to be built over to cross the grass plat between the T rails at each of the street crossings; that fact also appears from the testimony."

Again:

"I charge you again, if you believe from the testi-

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mony that the motorman had ample time to have discovered the plaintiff's position and then made no attempt to hold his car until it was too late, and the collision occurred for that reason, then the company would be held to be negligent. That he could in the exercise of common prudence—the plaintiff might have always reasonable time to make a crossing, and make it so without negligence."

Again:

"And then again that the defendant company, by reason of its tracks being laid in the center of Woodward avenue, had no exclusive right to that portion of the highway, and that the use by the cars of the highways does not deprive the persons of their right to drive thereon. They are constructed and operated upon the assumption that they will be driven upon and over, and mutual care should be used in both cases by both parties."

Again:

"I charge you, then, that under the testimony in this case that the motorman in charge of the car, if you believe his testimony, said that he saw the plaintiff when he was first attempting to cross the tracks, and he immediately realized and appreciated the plaintiff's danger, it then became his duty to have his car under control, in the way that any prudent person would do, where a danger was nearby."

It will be noticed that much of this charge is ambiguous, and it fails to state the duty on the part of the plaintiff to act as a reasonably prudent man should. It also fails to state that, if the motorman acted as a reasonably prudent man should, he would then have performed his duty. The law applicable to cases like this has been so recently stated in the cases cited that we deem it unnecessary to repeat what is said therein.

It may be well to add, however, that when a street is torn up so badly as this one was, with crossings so difficult to make, this situation makes added care

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necessary on the part of both the driver of the vehicle and the motorman. It is not necessary to discuss the other assignments of error.

The judgment is reversed, and a new trial ordered.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

KETCHUM *v.* KETCHUM.

1. EXECUTORS AND ADMINISTRATORS — ESTATES OF DECEDENTS — SALE BY ADMINISTRATOR TO HIMSELF — FRAUD — PRESUMPTION.

   While it is presumed that a sale of real estate by an administrator to a third person who thereafter conveys to the administrator, is void, the presumption is not conclusive; evidence showing good faith or sufficient consideration may be enough to rebut the presumption. 3 Comp. Laws, § 9095 (4 How. Stat. [2d Ed.] § 11248).

2. SAME — EVIDENCE — VALUE.

   Where the administratrix of an estate sold real property of the estate to pay debts, for a consideration of $900, taking a deed from the purchaser to herself on the same day, for the same consideration, and it appeared that the value of the property was $900, that it had been appraised at $950 and before it was sold a second appraisal was made at $900, the sale was voidable only, and the evidence tending to show good faith and sufficient consideration, uncontroverted, sustained the validity of the transfer.

3. SAME — FRAUD.

   Held, also, that the evidence was insufficient to establish either actual fraud or the claim that the administratrix was interested in the sale to such an extent as to invalidate it.

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Appeal from Shiawassee; Miner, J. Submitted June 3, 1913. (Docket No. 26.) Decided September 30, 1913.

Bill by Ada Ketchum and another against James Ketchum and another to correct a mistake in the description of certain deeds. Defendant filed a cross-bill setting up the invalidity of the conveyances in question. From a decree for complainant, defendant Ketchum appeals. Affirmed.

Walter M. Bush, for appellant.

Pulver & Pond, for appellees.

MOORE, J. The bill of complaint in this case is filed for the purpose of correcting a description in two real estate deeds. From a decree in favor of the complainant, the defendant James Ketchum has brought the case here by appeal.

On August 14, 1908, Daniel Ketchum died, leaving as his widow the complainant Ada Ketchum. She is the daughter of defendant Griselda Russell. The defendant James Ketchum, who resides in Virginia, is the brother of Daniel Ketchum, the deceased. Daniel Ketchum left no children and no brothers or sisters except James Ketchum. After due notice on September 14, 1908, Ada Ketchum was appointed administratrix of the estate of her deceased husband. She gave a bond and entered upon the duties of her office. Appraisers of the estate were appointed and a warrant and inventory issued. These appraisers took the oath of office and returned under oath as follows:

"In the Matter of the Estate of Daniel Ketchum, Deceased.

"A true and perfect inventory of all the real estate, goods, chattels, rights and credits of said estate, to wit:

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East half of lots 2 and 3, block 14, of the city of Owosso, Michigan $950 00
Household furniture ..... 75 00"

The administratrix filed an affidavit that the above was all the property belonging to the estate. Commissioners on claims were appointed who entered upon their duties and after due notice allowed claims: Owosso Grocery Company, $6.80; Griselda Russell, $597.85. They made due report of their findings and of their fees as $4 each. On February 3, 1909, the administratrix filed a petition for leave to sell the real estate. In that petition it was stated:

"Your petitioner further represents that as far as can be ascertained, and as she is informed and verily believes, the just debts and valid claims outstanding against said estate amount to $604.65, exclusive of interest, and also about $160 funeral charges and taxes, and that the charges and expenses of managing and administering said estate, including future probable charges and expenses, will amount to about $100. Your petitioner further represents that it is necessary, for the purpose of paying said debts, valid claims, charges, and expenses, to raise the sum of about $900 or thereabout by the sale of the following described real estate, or some part thereof, of which the said deceased died seised and possessed. The description, condition, and value of each parcel and of the whole of said real estate of which said deceased died seised and possessed, according to the information and belief of your petitioner, are as follows, viz.: The E. ½ of lots 2 and 3, block 14, of the city of Owosso. Your petitioner further represents that the value of said real estate described above, according to her best judgment and belief, does not exceed the sum of $1,000. And your petitioner further represents that the names and residence of the next of kin and heirs at law of said deceased and other persons interested in said estate, as your petitioner is informed and believes, are as follows: Your petitioner, the widow of said deceased, Owosso; James Ketchum, brother of said deceased, Burkley, Va."

Due notice of this application was published and

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affidavits of two freeholders were filed that a fair valuation of the property was $900. On March 8, 1909, the administratrix was authorized to sell at private sale the real estate for $900. She gave a bond and reported that she had made the sale to Mrs. Russell for $900 and asked that it be confirmed. It was confirmed by an order duly entered by the judge of probate March 17, 1909. After due notice of hearing Mrs. Ketchum filed a detailed final account as administratrix, showing that there had come into her hands as administratrix $975, $900 of which was from the sale of the real estate, and that she had disbursed $987.19. The only items in this account in favor of herself were household furniture $75, commission as administratrix, $45. This final account was duly allowed and the administratrix was discharged.

The deed from the administratrix to Mrs. Russell was made and placed on record March 18, 1909. Later, and upon the same day, Mrs. Russell made a quitclaim deed of the premises to Ada Ketchum, the consideration of which was stated to be $1 and love and affection, which deed was recorded in May, 1909. In January, 1911, Mrs. Ketchum made a land contract for the sale of this land to Christ Episcopal Church for $2,000. Later it was discovered that a mistake was made in the description in the two deeds, and this bill was filed June 14, 1912, to have them corrected. The defendant James Ketchum filed an answer in the nature of a cross-bill claiming the deeds were fraudulent and void, asking that they might be canceled and that he might be decreed to be the owner of a one-half interest in the premises.

The hearing was in open court. No witnesses were sworn on the part of defendant, and but one exhibit was introduced by him, and that was the claim presented on the part of Mrs. Russell to the commission-

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ers. The trial judge made a decree as prayed by the complainants. The case is brought here by appeal.

Counsel argue appellants claim under the following heads:

(1) The presumption of fraud is conclusive as a substantive rule of law.
(2) Christ Episcopal Church is not a bona fide purchaser.
(3) The evidence shows actual fraud.
(4) Complainant Ada Ketchum was interested in the sale.
(5) Accounting. Counsel for appellee concede that if either 1, 3, or 4 is established the decree of the court below is wrong.

1. Is the presumption of fraud conclusive as applied to this case? We quote from the brief:

"The presumption of fraud is conclusive as a substantive rule of law. 3 Comp. Laws, § 9095 (4 How. Stat. [2d Ed.] § 10248):

"'The executor or administrator making the sale, and the guardian of any minor heir of the deceased, shall not directly or indirectly purchase, or be interested in the purchase of any part of the real estate so sold, and all sales made contrary to the provisions of this section shall be void,' etc.

"Both deeds being executed on the same day, between the same parties, and covering the same land, the presumption of collusion is conclusive, the same as is the presumption that a child under the age of seven years is incapable of committing a crime, regardless of what the evidence might show"—citing *Clute* v. *Barron*, 2 Mich. 192; *McKay* v. *Williams*, 67 Mich. 547 (35 N. W. 159, 11 Am. St. Rep. 597); *Winter* v. *Truax*, 87 Mich. 324 (49 N. W. 604, 24 Am. St. Rep. 160); and other authorities.

Are these cases controlling in favor of the defendant? In the first of these cases the sale was made by a public officer directly to himself. Clearly not the case before us.

In the case of *McKay* v. *Williams*, *supra*, it appears that Mrs. Shults gave to her husband a power

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of attorney to sell and deed lands. On the same day he deeded the land to one Knight, who on the same day executed a deed back to the husband. We quote from the opinion:

"Both these deeds purported to be for the consideration of $600. The notary who drew the deeds and took the acknowledgments saw no money consideration pass between the parties. Both deeds were recorded the same day and at the same time. * * *

"In holding that the deeds introduced by the defendants are *prima facie* void upon their face, we do not militate against the rule declared by this court in several cases, that in ejectment all defenses are excluded that are not legal," etc.

Suppose in that case it had appeared that the full value of the property had been paid when the power of attorney was executed, or when the deed from Mr. Shults to Mr. Knight was made, would it not have overcome the *prima facie* case spoken of by CHAMPLIN, J.?

In *Winter* v. *Truax, supra,* the following language is used in the opinion:

"Cyrus A. Kellogg may possibly have acted throughout without fraud, and for the benefit of his ward, but this record does not show it. So far as he, as guardian, conveyed to Wright, and Wright immediately reconveyed to him, individually, for the same consideration, no title passed by the transaction. This case must be ruled by the case of *McKay* v. *Williams,* 67 Mich. 547 [35 N. W. 159, 11 Am. St. Rep. 597]. The whole record abounds with evidence of the efforts of Kellogg to get the legal title to this land in his individual name; and aside from the deed from Wright to him, which is void, his transactions would require very satisfactory evidence to explain why he assumed fiduciary relations with the estate of Helen E. Tucker, if he already had a valid title through Cole and Lewis."

In *Taylor* v. *Brown,* 55 Mich. 482 (21 N. W. 901), the following appears in the opinion:

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"The premises in question were regularly sold and conveyed under proper license for that purpose, by the executors of Jonathan B. Taylor, to pay debts of his estate to Caroline Taylor, who was, at the time she bid off the same at such sale, guardian for said minors. The facts in the case are all stipulated by the parties, from which it appears that, upon the sale of the property to Caroline, she paid the full cash value therefor, and that the sale was fairly and in good faith made by the executors, as was the purchase by Caroline, and that her guardianship was known to the executors at the time the sale was thus made. With a full knowledge of all the facts, the sale to said Caroline was regularly confirmed by the judge of probate, and in her capacity as guardian she accounted to the said executors for the purchase money of said property; they receipting the same to her accordingly."

The land was later sold to the defendants. Later one of the minors, after he became of age, brought ejectment for an undivided one-third interest. The court declined to hold that the executors' sale was void.

In *Otis* v. *Kennedy*, 107 Mich. 320 (65 N. W. 221), it is said in part:

"In *McKay* v. *Williams*, 67 Mich. 547 [35 N. W. 159, 11 Am. St. Rep. 597], Mr. Justice CHAMPLIN, referring to section 6042, 2 How. Stat. [1st Ed.], said:

" 'This statute was merely an affirmance of the common law.'

"We are therefore compelled to hold, both upon reason and authority, that sales of the kind in question are voidable only. The statute must be read in connection with the registry laws. 2 How. Stat. [1st Ed.] § 5683.

"Upon the question of whether there was evidence upon the face of the record to create in the minds of the defendants such a suspicion of bad faith in the executor as to put them upon inquiry, it appears that Pillard did not purchase until one month after the sale to Leonard. It is true that the deed to Leonard was not recorded until the date of the execution

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of the deed back to Pillard; but it frequently occurs that deeds are not put upon record on the date of their execution. We think this fact could not be construed as notice to a subsequent purchaser that anything was wrong about the purchase by Pillard, especially in view of the fact that the consideration in the deed to Pillard was greater than the purchase price recited in the Leonard deed, and also in view of the settled rule that the subsequent purchase by an executor of land which he has previously and in good faith sold under license of the probate court is legal. That such purchases are legal is held by Woerner in his work on the American Law of Administration (section 334, p. 702), in which the author says:

"'But the rule that an administrator cannot buy indirectly or acquire the property sold by him as administrator by the interposition of a third party does not extend to a subsequent bona fide purchase by him from one who himself purchased in good faith at the administrator's sale.'

"This doctrine is supported by *Wayland* v. *Crank*, 79 Va. 602; *Welch* v. *McGrath*, 59 Iowa, 519 [10 N. W. 810, 13 N. W. 638]; *Staples* v. *Staples*, 24 Grat. [Va.] 225; *Silverthorn* v. *McKinster*, 12 Pa. 67; *Creveling* v. *Fritts*, 34 N. J. Eq. 134."

As has already appeared, when the property was inventoried it was appraised at $950. Before it was sold it was also appraised at $900. Upon the trial of the case now before us it was shown that $900 was a fair price for the land when it was sold. This was shown by witnesses who lived adjacent to it, and there is no evidence to the contrary unless it may be inferred from the fact that two years later it was sold on land contract to Christ's Episcopal Church for $2,000. This inference is met by the undisputed testimony of witnesses that during that two years there had been a marked increase in real estate values in that vicinity.

The church warden and chairman of the building committee testified as to values:

"Q. What would you regard as a fair cash value of the property in controversy in March, 1909?

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"*A.* Well, there was quite a change along there just before that and just along about that time in values, before and after, but just at that time there was quite a depression in the city. I bought good houses and lots in Owosso for $400 that I afterwards sold for $800 or $900 within a year. I was familiar with it at the time the price was made, and I considered very seriously of buying it for the church at that time, and we thought at that time it was worth somewhere around $900 or $1,000.

"*Q.* What would you say as to the sum of $900 being a fair cash value for it at that time?

"*A.* At that time I think it was."

Mrs. Ketchum testified that when her mother bought the property she intended to live there so as to be near the church, and that it was not until she (Mrs. Ketchum) declined to move there with her mother, on account of the property being associated with the death of her husband, that her mother gave up the idea of living there and decided instead to deed the property to her only daughter Mrs. Ketchum. If these were the facts, the *prima facie* case made by the deeds was fully met.

3. Does the evidence show actual fraud? In support of this claim it is said Mrs. Ketchum is guilty of fraud because she made out the claim of her mother and swore to it before the commissioners. This claim which was presented shows that Mrs. Russell paid to the Ketchums January 15, 1902, $30, and from that time until the death of Mr. Ketchum, upon 17 different occasions, sums of money ranging from $4 to $79. It is unfortunate that after this suit was begun, and before the trial, Mrs. Russell died. The attorney who looked after the business, it is conceded at the time of the trial, was incompetent both physically and mentally to testify. Mrs. Ketchum swore that she kept this account for her mother, who was an old lady, and that she knew the sums of money were loaned as stated, and for that reason she swore

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to the account before the commissioners. If this is true, what she did does not convict her of fraud nor of any improper conduct.

It is nowhere claimed in the cross-bill that there were no debts against the estate of Mr. Ketchum. It is claimed therein that there was collusion between Mrs. Russell and Mrs. Ketchum. The following appears in the cross-bill:

"This defendant further avers that said complainant Ada Ketchum, with the intention of defrauding this defendant out of his interest in said estate and said property, in and by said scheme and as is set forth and described in said bill of complaint, obtained possession and control of the property involved in this suit at an expense or cost to her, as this defendant is informed and verily believes and charges the truth to be, of not to exceed the sum of $900, and that thereafter said complainant Ada Ketchum sold the said property to the said Christ Episcopal Church, upon a contract, for the sum of, to wit, $2,500, thereby defrauding said estate and this deponent out of the sum of, to wit, $1,600."

The land contract shows a consideration of $2,000 and not $2,500, and this contract was made nearly two years after the sale.

No proceedings have ever been taken to set aside the allowance of claims or the allowance of the final account, which included funeral expenses, doctor's bill, and expenses of administration.

4. Was complainant interested in the sale? The claim that she was is based upon the fact that her mother had, prior to the sale, for the purpose of making a testamentary disposition of her property, made conditional deeds to real estate to her daughter, and that to enable her mother to borrow money to pay the funeral and other expenses the daughter joined with her in making a note and mortgage to the bank, where the money was borrowed. It is the testimony that at this time Mrs. Ketchum had no property of

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her own except her interest in her husband's estate and her interest in the real estate so deeded by her mother, and that the loan from the bank was made to Mrs. Russell.

This is a chancery case where the defendant James Ketchum is asking affirmative relief upon his cross-bill. The record shows that when Daniel Ketchum died he left nothing except this house and lot worth $900 and household goods worth $75. It also shows that, when his debts were paid and the last illness, funeral, and administration expenses were met, the estate was exhausted, and there was nothing left, either for the widow or the brother. Had not real estate suddenly acquired additional value, it is not likely this litigation would have occurred.

The decree is affirmed, with costs.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

ANDRIES *v.* EVERITT-METZGER-FLANDERS CO.

1. DAMAGES — AUTOMOBILES — INJURY — MOTOR VEHICLES — EVIDENCE—VALUE OF USE.

   Plaintiff, who claimed that defendant damaged his car by running into it, was correctly allowed to testify what the value of the use of the car amounted to during the time that he was deprived of it.

2. ADMISSIONS—APPEAL AND ERROR—CURING ERROR.

   There was no reversible error for admitting evidence of admissions made by the officer of a corporation when he

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testified, as a witness, to the facts claimed to have been admitted on the trial of an action for damages to plaintiff's automobile.

3. AUTOMOBILES—NEGLIGENCE.
Evidence considered, and *held*, to present a question of fact relative to defendant's negligence in colliding with plaintiff's motor car.

4. SAME—CARE REQUIRED—TRIAL—REQUESTS TO CHARGE.
Defendant's requests to charge the jury were not improperly denied when the court fully covered the same subjects in different language.

Error to Wayne; Murphy, J. Submitted June 9, 1913. (Docket No. 47.) Decided September 30, 1913. Rehearing denied January 5, 1914.

Case by Joseph H. Andries against the Everitt-Metzger-Flanders Company for damages to plaintiff's automobile. Judgment for plaintiff. Defendant brings error. Affirmed.

Denton Guinness, for appellant.

George B. Greening, for appellee.

MOORE, J. This suit grew out of an automobile accident. It was started in justice's court, and appealed to the circuit court. From a judgment in favor of the plaintiff for $450, the case is brought here by writ of error.

The plaintiff is a doctor. It is his claim that while he was driving his runabout north on Brush street, across Medbury avenue, at the rate of eight or ten miles an hour, the driver of one of defendant's automobiles came out of Medbury avenue at a rate of speed not less than 30 or 35 miles an hour, and came into collision with his car.

"I drove along until I got near to the little court shrubbery on Medbury avenue, and just passing that I saw this car about 15 or 20 feet from me. I was helpless, and this man bore down on me and struck

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my car almost at the center. His car picked mine right off the ground, and carried it from where I was, on the right-hand side of Brush, to the left side of Brush, on the corner, and threw the car around on the curbstone sidewalk. His car, after hitting mine, swung around completely, and also ran to the corner of Brush and Medbury, that is, on the northwest corner, and then, after he struck my car, you could see that about 15 feet before he hit me he put on his emergency brake, or rather a brake, and his car skidded for about 15 or 20 feet, and after skidding, and his car hitting my car, it carried it about 30 feet across the street with such violence that you could not see where my tires or wheels had skidded on the street; it picked it up in the air without skidding at all. * * * I say he picked my car up and carried it from the right-hand side of Brush street clear across and threw it on the curb on the left-hand corner, and I was in the car all this time. I was stunned."

He testified that he sustained a nervous shock; that it cost him $249.59 for repairs to his automobile; that during the time his machine was being repaired he was compelled to hire other vehicles and transportation to go about.

"*Q.* What would be your reasonable charge for the loss of the use of that car during that time and the expense you were put to?

"*A.* I would value the use of the car at about $5 a day.

"*Mr. Guinness:* I object to it, and move to strike it out.

"*The Court:* It may stand. Exception for defendant.

"I suffered a nervous shock for quite a while afterwards. For a few days, probably a week, I was not able to attend to my regular business, and was compelled to have somebody at my business.

"*Q.* How much did you actually lose in dollars and cents for loss of business while you were laid up, loss of time and services?

"*Mr. Guinness:* I object to that as not specified in the declaration.

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"*Q.* Did you suffer any pain or annoyance yourself?

"*A.* I had a headache for a few days from the blow I received.

"*Mr. Greening:* I call your honor's attention to the bottom of the third page, that he has been deprived of his earnings as a physician during the time he was so injured, etc. I figured the actual loss would be about $250. That would be far in excess of what I claim in this case. I am willing to waive the excess of the damage I claim in this case. The total, $249.59, and $175 for the use of the car, and $250 for the personal injuries, would bring it up over $500, and I waive all the excess above the $500."

The driver of the car told a different story, though he admitted his car was going 15 or 20 miles an hour.

Counsel argue their case under the following heads:

(1) Errors in testimony during trial.

(2) The court should have directed a verdict for defendant, either when plaintiff rested, or when both sides rested.

(3) Errors in court's charge, refusal to give requests to charge, and argument of counsel.

(4) Motion for new trial.

We take up the case in the order pursued by counsel.

1. It is said the court erred in allowing the value of the use of the car. It will be noticed no reason was given for the objection to this testimony; but even if one had been given the testimony was competent.

The following is said to be reversible error:

"*Q.* Did Mr. Spencer, in the presence of the driver, tell you he was going about 25 or 30 miles an hour?

* * *

"*A.* They took Mr. Funke aside, and I heard them say, 'You certainly must have hit him an awful smash.' "

The record shows Mr. Spencer was assistant secretary of the defendant, and arrived on the scene

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while the parties were all there, and while the automobiles were in the positions left by the collision. Mr. Spencer was called as a witness by the defendant. On cross-examination he testified in part as follows:

"*Q.* Didn't you state in the presence of the doctor and his brother that he must have got an awful bump, that your driver must have hit him an awful bump?

"*A.* I told you I stated that the day the accident occurred; I don't remember the other man being there.

"*Q.* You stated to him your driver must have given him an awful bump?

"*A.* Yes, it must have been an awful bump."

If there was any error in the first instance, it was harmless error, in view of the fact that Mr. Spencer testified to the same thing.

2. Did the court err in declining to direct a verdict for defendant? In view of the doctor's testimony, which we have quoted, it would have been error to direct a verdict for defendant, as the plaintiff's testimony made a question for the jury.

3. Did the court err in his charge and in his failure to give defendant's requests? We quote one of these requests:

"If you find that plaintiff could have seen defendant's machine coming in time to have avoided a collision, either by turning to the left or stopping or in any other way, your verdict should be for the defendant."

The court gave a long general charge, and told the jury repeatedly what was the duty of the respective drivers. We quote:

"Examining a little more specifically the duty resting upon the plaintiff, it was his duty, in driving his automobile, to have regard for the fact that Medbury avenue was open for traffic, and it was his duty to do what a reasonably cautious man, a man of average prudence, would do under like circumstances.

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Indeed, gentlemen of the jury, in testing the conduct both of the plaintiff and of the defendant's driver, Funke, to determine whether either of them was guilty of any negligence, this is the test furnished you by the law for determining that fact: Each of them, both the plaintiff and Funke, was expected to do, as he drove his automobile, what a man of average prudence, what a man of ordinary caution, would do under like circumstances. Thus, gentlemen of the jury, not the highest degree of care and caution was exacted of them; but as the doctor, the plaintiff, drove his automobile north on Brush street, and as Funke drove his car west on Medbury, each of them was expected, under the law, to do what, under the then existing conditions, a man of average ordinary caution and prudence would do. Now, if either of them failed in that respect, such failure would be negligence. It is for you to say, then, gentlemen of the jury, keeping in mind the conditions as they existed that day, with reference to the light, with reference to the opportunity for seeing or not seeing the approach of a car, keeping in mind all the circumstances as they are established by this evidence here —it is for you to say whether the doctor, whether Funke, each operated his car as a man of average, ordinary prudence would do under like conditions. If you find that the doctor did, and that Funke did not, and that Funke's failure resulted in injuries to the plaintiff, that would entitle the plaintiff to recover. If you find that the doctor did not operate his car under the then conditions as a reasonable man of ordinary prudence would have done, then the doctor could not recover. Likewise, if the driver, Funke, operated his car as a man of ordinary caution would do, under the conditions then existing, then the defendant would not be liable.

"To make out the plaintiff's right to recover then, gentlemen, upon this phase of the case, it must be shown by the evidence that the plaintiff operated his car with that degree of caution which an ordinary man would exercise under like conditions, and that Funke did not do so, resulting in the plaintiff's injuries, and if that is your finding, the plaintiff is entitled to recover."

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We think this fully covered the law of the case. The other assignments of error have been examined; but we deem it unnecessary to discuss them.

The judgment is affirmed.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

GORREY *v.* W. F. HURD CO.

1. MASTER AND SERVANT—EVIDENCE OF CUSTOM—GUARDS—PERSONAL INJURIES—NEGLIGENCE.

Where plaintiff claimed that the superintendent of defendant had promised him to repair a defective sticker machine near his place of work, and that the defendant failed to make the promised repairs to the machine, which threw a splinter into plaintiff's eye, and it was apparent that plaintiff knew of the dangerous condition, evidence that other manufacturers provide hoods for sticking machines of that kind to protect the side heads, was not material, plaintiff failing for other reasons to establish liability.[1]

2. SAME.

Held, that the testimony showed plaintiff knew the exact situation and might have protected himself from injury, but that he did not regard the alleged defect as dangerous to him.

Error to Wayne; Van Zile, J. Submitted June 10, 1913. (Docket No. 65.) Decided September 30, 1913.

[1] The question of the liability of a master for injuries caused by splinters flying from hammers or chisels, punches, and other similar tools is treated in notes in 13 L. R. A. (N. S.) 670; 30 L. R. A. (N. S.) 800; and 40 L. R. A. (N. S.) 832.

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Case by Michael Gorrey against the W. F. Hurd Company for personal injuries. Judgment for defendant upon a directed verdict, plaintiff brings error. Affirmed.

Samuel E. Jones, for appellant.

Sherman D. Callender, for appellee.

MOORE, J. The plaintiff was a woodworker employed for four or five years by defendant on a sticker machine. He claims to have received an injury to the eye, not from his machine, but one adjoining it and about four feet away. This suit was commenced by declaration. Omitting its formal parts, the material averments are:

"Whereupon it became and was the duty of said defendant corporation to furnish the said plaintiff with reasonably sound, safe, and suitable machinery, appliances, fixtures, and place for the making and manufacture by said plaintiff of said woodenware as aforesaid, while so employed by said defendant as aforesaid. Yet the said defendant, not regarding its duty in that behalf, without the consent of the plaintiff, furnished and operated a certain machine in its factory, to wit, a sticker machine, for use by its employees in the aforesaid factory, which sticker machine was not reasonably sound, safe, and suitable for the purpose aforesaid, but on the contrary thereof was defective and wholly unsound and unsafe in this, to wit: That the aforesaid sticker machine was not provided with a sheet iron hood over the knives attached to the heads of the sticker machine to protect employees from slivers and other material thrown out, whereby and by means of the premises, and while the said plaintiff, with due care and caution upon his part, was operating an adjoining machine, there being a space of about four feet between the machine plaintiff was operating and the aforesaid sticker machine, and in the employ of said defendant, as aforesaid, without any fault or negligence upon the part of plaintiff, he was injured by having his left eye injured and destroyed by being struck in the

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left eye by a flying sliver thrown out from the aforesaid sticker machine, which injury to the left eye affected and impaired the vision of the right eye.

"And plaintiff avers that the place or shop where plaintiff was required and commanded to work in by the superintendent of the defendant corporation, on or about the 4th day of April, 1911, was not a safe place to work; that the aforesaid sticker machine which injured him was an old and obsolete make and a dangerous machine and was not provided with a sheet iron hood over the knives attached to the heads of the sticker machine, as is the custom so to do on similar machines.

"And plaintiff avers that the sticker machine which injured him on the 4th day of April, 1911, was not protected or guarded as ordered by the State factory inspector and as required by the statutes of the State of Michigan, to wit, section 15, Act 285, of the Public Acts of 1909.

"And plaintiff avers that the sticker machine which injured him on April 4, 1911, was defective as aforesaid, and that the defect was known to the defendant corporation, and plaintiff avers that on March 31, 1911, he called the attention of the superintendent of the defendant corporation to the defective condition of the aforesaid sticker machine which injured him, and the superintendent of the defendant corporation promised to repair and make safe the aforesaid sticker machine and ordered plaintiff to continue work, and plaintiff, relying upon the promise to repair the defects on the aforesaid sticker machine, continued to work for a period of three days, when plaintiff was injured as aforesaid through the neglect of defendant corporation to repair and make safe the sticker machine as aforesaid, whereby the plaintiff became and was sick, sore, lame, and disordered and so remained and continued for a long space of time, to wit:"

The trial disclosed that hoods had been put over the upper and lower knives of the machines, but that none were over the small sideheads that shaped the edges of the article planed, and no factory inspector had ever directed that hoods should be over them.

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The trial judge was of the opinion that plaintiff had failed to make a case and directed a verdict in favor of defendant. The case is brought here by writ of error.

We quote from the brief of counsel:

"Assignments of error 1, 2, 3, 4, and 5, all relating to the same matter, will be discussed together. Witness Eikoff was asked some questions, in relation to the custom of other factories using the same kind of machine, as to placing hoods over the side heads over said machines. The court sustained an objection thereto, because the court maintained that immaterial testimony given by a witness in behalf of the defense could not be impeached by plaintiff. If the testimony were immaterial, there is no doubt but what that is the rule; but the question here before this court is: Can custom be shown? Or, in other words, is it competent to show that similar machines used by other manufacturers, that it is the custom by them to protect such machines so that workmen are safe from injury by reason thereof? I contend that the testimony is material. And in support of that contention I desire to cite the following cases:"

The averments of the declaration and the proofs offered on the part of the plaintiff are an answer to this contention. The plaintiff knew and had known just the condition of the machine, and his claim is that he continued to work, relying upon a promise to place a hood over the side knives. He gave proofs tending to support that claim. The foreman of the defendant swears the subject was never mentioned to him.

Under the issue as framed, the question of custom was immaterial. We again quote from the brief of counsel:

"As to the last assignment of error in this case; that is, in the granting of motion of defendant's counsel in directing a verdict for defendant. It is a well-settled principle of law in this State that an employee being injured in the course of his employment by

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machinery which has become dangerous for want of repair and which the principal promises to repair on being notified of its condition, and the employee relying upon the promise to repair continues his work and is injured by reason of the defect while so continuing at work, it becomes a question for the jury as to whether or not the employee had a right to rely upon the master's promise to repair and whether as an ordinary prudent man he was justified in continuing to perform the service in the manner in which it was performed. In support of this proposition the court is cited to the following authorities: *Mann* v. *Railway,* 124 Mich. 641 [83 N. W. 596]; *Schlacker* v. *Mining Co.,* 89 Mich. 253 [50 N. W. 839]," and other cases.

There might be much force in this contention if the record was different. Plaintiff preferred no requests to charge. The trial judge was not told plaintiff desired this phase of the case submitted. The only assignment of error that can be said to relate to it reads as follows:

"That the court erred in charging the jury to render a verdict against the plaintiff and in favor of the defendant as requested by motion of defendant's attorney."

The case was very carelessly tried. However, the testimony of the plaintiff does disclose that he had a pair of large eyeglasses which he used to protect his eyes when grinding his tools at the emery wheel. His testimony in part is:

"*Q.* Did you wear them?
"*A.* If there was very much dust I would put them on.
"*Q.* Did you have them on on the 4th of April, 1911?
"*A.* No, sir.
"*Q.* Why not?
"*A.* Because there was no dust; I had no occasion to.
"*Q.* No dust that morning?
"*A.* No, sir. * * *

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"Q. You had them with you in your pocket on the 4th of April, when you were running this machine; that you did not put them on because you did not think you needed to put them on?
"A. No, sir."

The record also shows that a board had been prepared which, if put in place between the machines, would have intercepted the shavings and dust and had been used by the operator of the other sticker machine, and that plaintiff knew of this board and its use but did not use it.

The claim now made by the plaintiff is, to say the least, a strange one. He says a sliver struck him in the eye, and that one of his fellow employees pulled it out. The fellow employee testified that he never heard of a sliver but at times had been requested to remove dust, which he had done by rolling the lid of the eye over a lead pencil. The plaintiff never made complaint to the defendant, or any of its officers, that he had a claim against it. He testified in part as follows:

"Q. And then from the time that you got hurt until about ten weeks you were not at the factory?
"A. I had a small pay coming to me and about two or three weeks after I was hurt I went down and got paid, I had a few days' pay coming and I went down and got it.
"Q. That would be about three weeks after April 6th?
"A. Well, it may be; yes, sir; it was because I did not leave the house. I was from the doctor's to the house all the time.
"Q. And the day when you say you got this sliver you were at the factory only once and that is when you went down to get your pay?
"A. I was at the factory to get my pay and then when I got kind of well I went back to the factory to go to work and that was Tuesday.
"Q. How long after you got the sliver did you go down there?

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"*A.* It must have been about 10 or 12 weeks after I went down there, I know this day.

"*Q.* After you got the sliver?

"*A.* Yes, sir.

"*Q.* That was about 10 or 12 weeks?

"*A.* To my best estimation, I was not fit to work, but I was going to try it.

"*Q.* And who did you see when you were discharged?

"*A.* William F. Hurd.

"*Q.* William F. Hurd, president of the company?

"*A.* Yes, sir.

"*Q.* And he told you he did not need your services any more?

"*A.* I started to work on the machine.

"*Q.* Did he dismiss you?

"*A.* Yes, sir; he said, 'You are not wanted.'

"*Q.* Up to that time had you consulted an attorney about your claim?

"*A.* No, sir; not up to that time.

"*Q.* Never had consulted any one about your claim previous to that time that you were discharged?

"*A.* Until after I was discharged.

"*Q.* And about when was it, as you remember it, that you first made up your mind you wanted to make a claim against this company?

"*A.* After I was discharged and I saw the situation I was in.

"*Q.* After you were discharged?

"*A.* Yes, sir.

"*Q.* After you were discharged did you make up your mind you wanted to sue this company?

"*A.* About a month or two after.

"*Q.* And then that would be along in October?

"*A.* I could not say for sure, I know I was discharged and I thought I suffered 20 weeks at home idle and a doctor bill and I thought I could not stand for all that.

"*Q.* If you had not been discharged you would not have done anything about it?

"*A.* No, sir."

No one understood the situation better than the plaintiff. He had worked for several years where he was when hurt. He did not regard the situation as

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dangerous. If he had, the use of his glasses would have removed the danger, or the use of the thin board between the machines would have prevented any injury. We cannot say an improper result was reached in this case.

Judgment is affirmed.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

SMITH v. AMERICAN INSURANCE CO.

INSURANCE—CONCURRENT INSURANCE—VENDOR AND PURCHASER.

Where the plaintiff, with the consent of defendant insurance company, sold the property insured under a land contract which provided that the purchaser should keep the premises insured for the benefit of the seller, and in case of loss the insurance should apply on the unpaid balance due, and where the vendee obtained further insurance of another corporation on the equity in the property, an action lay in favor of the vendor against the first insurer for the full amount of the policy which was less than the balance due under the land contract. Since the vendee obtained the second policy without the vendor's consent, the rights of the latter were not affected, and he was not entitled to any benefit under that policy of insurance.

Error to Ingham; Collingwood, J. Submitted June 16, 1913. (Docket No. 130.) Decided September 30, 1913.

Assumpsit by Edward P. Smith and Carrie Smith

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against the American Insurance Company on a policy of fire insurance. Judgment for plaintiffs, and defendant brings error. Affirmed.

Cummins & Nichols, for appellant.

Harry E. Hooker, for appellees.

MOORE, J. This is an action on a policy of fire insurance issued by the defendant covering a dwelling house, then owned by plaintiffs, and situate in the city of Lansing. At the close of the proofs defendant moved the court to direct a verdict, which motion was overruled. Defendant thereupon submitted certain requests to charge, which were refused by the court. Verdict and judgment were in favor of plaintiffs for $717.50, which was the full amount of the policy and interest. The case is here by writ of error.

The facts are as follows: At the time of the issuance of the policy plaintiffs were the owners in fee of the property. Later they sold the property on land contract to one Amelia Ossanetzki, who agreed to keep the property insured for the benefit of the plaintiffs. To accomplish that result, she paid them the premium for the unexpired portion of the insurance, and the parties went to the agent of defendant and stated to him the situation, when the following indorsement was made on the policy:

"Permission is hereby granted to sell the property covered by this policy, on contract to Amelia Ossanetzki attached to, and forming a part of policy of No. 9099 of the American Insurance Company of New Jersey.

"Dated at Lansing, Mich., December 20, 1910.

"LANSING INSURANCE AGENCY, Agent.

"Per CHAS. S. EMERY, Secy."

The policy so indorsed was left with the plaintiffs. On the execution of the contract, Mrs. Ossanetzki

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went into possession, and continued in possession until the property was destroyed by fire, and at the time of the trial the land contract was still in force. At the time of the fire there was due on the contract $700 and interest. About six months after the land contract was made, Mrs. Ossanetzki procured insurance in her own name on her interest in the house and on her household goods. The plaintiffs had no knowledge of this insurance until after the fire, and their names are not mentioned in the second policy. On December 17, 1911, the dwelling house was completely destroyed by fire. There was no claim the building did not exceed $700 in value, nor was there any dispute but that the value of the lot, without the dwelling, was about $400.

The policy issued by the defendant company was the usual form of Michigan standard policy, and contained this clause:

"This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon."

There was attached to and made a part of the policy this clause:

"Other concurrent insurance permitted; but it is especially agreed that if there shall be other insurance on said property, this company shall be liable only *pro rata*, with such other insurance, whether same covers concurrent with this policy or not."

In the land contract between the plaintiffs and Mrs. Ossanetzki there appeared this clause:

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"(3) Said second party shall keep the buildings now on, or that may hereafter be placed on, said premises insured in the name and in manner and amount and by insurers approved by said first party and leave the policy with first party, and in case of loss the insurance, unless by mutual agreement used to repair or rebuild, shall be paid to first party and be indorsed on this contract to the extent of the amount unpaid thereon, and the balance if any shall belong and be paid to second party."

The second insurance company claimed to Mrs. Ossanetzki that their policy on the house was void because of the previous policy, and returned that part of the premium applying to the insurance on the house, and paid her her loss on the household goods, and canceled the policy.

We cannot state the claim of defendant better than to quote from the brief:

"At the time of the issuance of the policy, plaintiffs were owners in fee of the property insured. And had the loss occurred while they remained the sole and unconditional owners of the property, no question would have arisen as to the liability of defendant for the full amount of the policy sued on in this case. But at the time of the fire, plaintiffs' interests had changed (with consent of defendant) to that of vendors. They were not at the time of the loss the sole and unconditional owners of the property. On the contrary, their vendee, Mrs. Ossanetzki, was the sole and unconditional owner of the property."

"'The proposition that the vendee under a contract for the purchase of land, or under a bond for conveyance of title, is a sole and unconditional owner, within the meaning of a policy of insurance, is supported by well-nigh all the authorities; only a few cases being found to dispute it,' citing cases. [20 L. R. A. (N. S.) 775, case note.]

"Undoubtedly the vendee, Mrs. Ossanetzki, had an insurable interest to the full value of the property. * * * But in the case of a vendor, the rule is different. The only loss or damage which the plain-

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tiffs could by any possibility suffer was the loss or damage to their interest in the property insured. * * * We submit, therefore, that plaintiffs were not entitled to recover, in any event, more than the 'loss or damage' to their interest in the property insured."

"Now, what was the 'loss or damage' to plaintiffs' interest? It is undisputed that at the time of the loss there was $700 balance due on plaintiffs' contract with their vendee. It is also undisputed that at the time of the loss a policy of insurance on this same property had been taken out by plaintiffs' vendee in her own name in the Commonwealth Insurance Company for $700. By the terms of the land contract between plaintiffs and their vendee, it was made the duty of the vendee to keep the premises insured in the name of the vendors, 'and in case of loss the insurance, unless by mutual agreement used to repair or rebuild, shall be paid to first party and be indorsed on this contract to the extent of the amount unpaid thereon.' While it is true that the policy in the Commonwealth Company was surrendered by the vendee and not recovered on by either the vendee or the plaintiffs, it is likewise true that the policy in that company was valid and enforceable, and the proceeds in equity belonged to the plaintiffs. * * *

"But the result of such a doctrine leads to the absurdity and injustice of permitting the plaintiffs to recover the amount of the balance due on their contract from the defendant, and at the same time collect the same amount from the Commonwealth Company under their contract with their vendee, (unless it should be held that the policies in these two companies must prorate the loss, a proposition we will take up later). * * *

"If the court should not accede to these views, then we contend that defendant company under its contract with plaintiffs was entitled to prorate the loss with the Commonwealth Insurance Company, and was only liable for one-half of the loss, or $350."

This proposition is argued at length. Finally counsel say:

"If it be held that the policy in the Commonwealth

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Company is not other insurance within the meaning of the defendant's policy, and that defendant is not entitled under its contract with plaintiffs to prorate this loss with the Commonwealth Company, the result will be to establish a rule of law in this State that will permit a vendor to recover from two or more companies the full amount of any and all policies that may exist on the same property in his own name or for his benefit, thereby recovering, as in this case might have and still may be done, twice the amount of the loss or damage to his interests, and several hundred dollars more than the admitted value of the specific property destroyed. No such construction, in the interests of honesty and fair dealing, is called for. And the plain language of the contract does not permit of it."

We do not agree with the views expressed by counsel which we have quoted. When the policy was obtained from defendant by plaintiffs, they were the owners in fee of the property. Later they made a sale of the property upon land contract, with the consent of defendant, and, everybody who was interested recognizing that they retained an insurable interest in the property, the permit to sell was granted, and they retained the policy; the agreement being between the vendor and the vendee that, if loss occurred, the plaintiffs might receive as their portion of the loss the amount unpaid on the contract, and the balance be paid to the vendee. Neither the plaintiffs nor the defendant were ever parties to any other or different contract. The vendee, without consulting either the plaintiffs or defendant, insured her interest in the property in another company. Whether the second policy was good or bad as to the vendee of the plaintiffs is not a question necessary to decide. Plaintiffs had no interest in the second policy because their vendee had already carried out her agreement to keep the property insured for their benefit.

We think it equally clear that the policy which had been retained by the plaintiffs, under the agreement

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between the plaintiffs and their vendee, could not be changed to the harm of the plaintiffs without consulting them, by their vendee attempting to get insurance upon her interest in the property. See *Miller* v. *Aldrich*, 31 Mich. 408; *Hall* v. *Insurance Co.*, 90 Mich. 403 (51 N. W. 524); *Hogadone* v. *Insurance Co.*, 133 Mich. 339 (94 N. W. 1045); *Brunswick-Balke-Collender Co.* v. *Assurance Co.*, 142 Mich. 29 (105 N. W. 76); *Id.*, 150 Mich. 311 (113 N. W. 1113); *Craig* v. *Insurance Co.*, 162 Mich. 657 (127 N. W. 757); *Goodwin* v. *Insurance Co.*, 163 Mich. 41 (127 N. W. 790).

Judgment is affirmed.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

GOODYEAR v. DETROIT UNITED RAILWAY.

1. STREET RAILWAYS—BOARDING CAR—NEGLIGENCE.
   Testimony in plaintiff's behalf that the decedent attempted to board defendant's car while it was standing, that, as he put his foot on the steps, the car started with a jerk, throwing him under the wheels and fatally injuring him, although defendant's testimony tended to contradict the claim that the car was standing still, sufficiently presented a question for the jury.

2. SAME—CARRIERS—WEIGHT OF EVIDENCE.
   The testimony of the witnesses, being in dispute, was for the jury to weigh and the court rightly denied a motion for a new trial on the ground that the verdict was contrary to the weight of evidence.

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3. SAME—NEW TRIAL—CUMULATIVE EVIDENCE.

Held, also, that the court properly refused a new trial on the ground of newly discovered evidence which appeared to be merely cumulative and was not likely to change the result.

4. SAME.

The discretion of the trial court in denying a new trial for the reason that new evidence has been discovered, will not be disturbed on appeal, unless a clear abuse thereof appears.

Error to Wayne; Murphy, J. Submitted June 10, 1913. (Docket No. 63.) Decided September 30, 1913.

Case by Arthur A. Goodyear, as administrator of the estate of Albion A. Goodyear, deceased, against the Detroit United Railway for the unlawful killing of decedent. Judgment for plaintiff. Defendant brings error. Affirmed.

Corliss, Leete & Joslyn (Wm. G. Fitzpatrick, of counsel), for appellant.

Choate, Webster, Robertson & Lehmann, for appellee.

STEERE, C. J. Plaintiff, as administrator, brought this action to recover damages for the estate of his father, Albion A. Goodyear, who sustained injuries, from which he subsequently died, while attempting to board one of defendant's cars while transferring at the intersection of Clay and Oakland avenues, in the city of Detroit. Oakland avenue runs north and south and is crossed by Clay avenue running east and west, in said city. Defendant maintains a double-tracked line on Oakland and a single-tracked line on Clay, connected with the two tracks on Oakland by a double switch. Some of the cars going north on Oakland run through to the city limits, while others

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turn at Clay and proceed easterly along that avenue. Passengers going south on Oakland and wishing to go east on Clay make connections and transfer at that street intersection.

Deceased was a woodworker by trade, employed by the Wilson Body Works, earning $2.75 per day; he lived on Harmon avenue, north from Clay near Oakland, and traveled the route mentioned in going to and from his place of employment. He was 67 years of age, vigorous, a member of a long-lived family, and in perfect health at that time. On the morning of December 6, 1910, at about 6 o'clock, starting to his work, he took a south-bound Oakland avenue car which made its stop at Clay about opposite the north curb of the latter avenue. Deceased, with other passengers, left it by the rear door, crossing the tracks and switches on Oakland, to board the east-bound Clay car which stood waiting to the south of the switch on Oakland at the regular stopping place for transfer. At this time of the day workmen were going to their places of employment and the Clay car was crowded; it being somewhat difficult to get even standing room. A number of passengers got upon the car both at the front and rear platforms. The operators of this car were both extra men, not on regular runs. After stopping at the place of transfer the motorman set the switch for Clay avenue and resumed his position at the front, and the conductor stood on the rear platform to attend the trolley as the car swung around the curve onto Clay avenue. At the time of the transfer passengers crowded the platforms around both men. About the time the motorman, on signal from the conductor, started the car, deceased was attempting to get upon the front platform.

It is the claim of plaintiff that the car was standing when deceased attempted to get on board of it, but that it was suddenly started just as he was in

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the act and before he had opportunity and reasonable time in which to complete such act, throwing him down so that he fell partially under the car; his right foot was crushed and he received fatal injuries. Immediately after the accident he was taken to a hospital where his injuries were attended to and his mangled foot was amputated; but he died that afternoon.

On behalf of defendant it is contended that deceased made the attempt to catch the car after it had started, meeting it when it swung around the curve onto Clay from its stopping place on Oakland, as he came southeast from the rear of the Oakland car he had just left, and was therefore guilty of such negligence on his own part as precluded recovery.

Plaintiff recovered a verdict and judgment for $2,500. Defendant thereafter moved for a new trial, on the ground of newly discovered evidence, because the verdict was against the weight of evidence and because the court had erroneously denied defendant's previous motions, made during the progress of the trial, both at the conclusion of plaintiff's testimony and of all the evidence, for a directed verdict in its favor. This motion was also denied.

The errors argued in defendant's brief and relied upon are:

"(A) Overruling its motion for a directed verdict made at the close of plaintiff's evidence.

"(B) Overruling its motion for a directed verdict made at the close of all the evidence.

"(C) Overruling its motion for a new trial on all the grounds, but particularly on the ground of newly discovered evidence."

While negligence is said to be a mixed question of law and fact, the mixture is less confusing and the lines more distinctly drawn in cases of this nature, where the standard of duty and responsibility is not variable and shifting according to the circumstances

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of each particular case; here it is fixed and well defined.

When street railway companies are furnishing transportation along their lines to the public for hire, starting and stopping at frequent intervals to receive and discharge passengers, the respective rights and duties of each at such times are definite. The law is well settled and its application positive when the facts are once ascertained. The trial court distinctly and correctly stated it to the jury in plain language, which could not be misunderstood. The jury was told that:

"Where a car operated by a company is standing still, and a passenger, or a prospective passenger, seeks to board that car, it is the duty of the company, through its employees in charge of the car, to keep the car standing still until a reasonable opportunity is afforded the person seeking to board it to get on and come to a position of safety upon the car; and if, while a car is standing still, one of those seeking to board the car is prevented from completing the act of getting on it, by reason of the car being moved forward, and the person thus prevented be thrown to the pavement and injured, for any such injuries received in such manner as that the defendant company would be liable. * * *

"The defendant claims, as I stated, that Mr. Goodyear attempted to board the car while it was in motion. If this is shown to your satisfaction, then the defendant would be entitled to a verdict. One who attempts to board a moving car under the conditions shown in this case, if he be injured, cannot hold the company responsible for any injury. * * *

"The sole ground upon which the plaintiff may recover under the declaration filed, and under the testimony given before you, is that Mr. Goodyear began the act of boarding the car when the car was stationary, standing still, and that when he was in the process of getting on the car, and before he had reasonable opportunity to complete the act, it was started forward, precipitating him to the pavement. That

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is the sole question presented under the plaintiff's case for your decision."

No complaint is made of the charge of the court provided the case should have been submitted to a jury. Refusal to direct a verdict is the error assigned and argued.

Of the eight witnesses who gave testimony relating to the accident, including the conductor and motorman, but one, Duford by name, was an eyewitness to deceased's attempt to board the car. He was on the ground and gave the alarm. The others were on the car and first learned of the trouble when the alarm was given. Another witness, named Errick, who was on the rear platform and looked around, saw deceased in the act of falling but says he did not know whether he was getting on or off.

Duford worked for the American Blower Company and had come south from his home on the same car with deceased, whom he only knew by sight, having seen him from time to time as they rode on the same cars to and from their work. Duford also desired to take the Clay avenue car east to his place of employment and left the Oakland avenue car, by the rear door, behind deceased. He was a cripple and, not being able to move as rapidly as the others, fell behind. He testified, that he was within about 25 feet of the Clay avenue car when it started and had a clear view of what transpired; that the car which was going out Clay avenue had stopped that morning, at the usual place of stopping, on the south side of Clay and south of the switch. He described the accident as follows:

"When we got to the corner of Clay we got off the car, Mr. Goodyear ahead of me, and I was on the back of the car and was following him, to take the car going out Clay. There was a car standing on Clay avenue, waiting to follow the one going down town that we had gotten off of. Another car coming from

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town that both Mr. Goodyear and I wanted to take to go out to work. This car I didn't feel as though I could make it. I kind of held back, not knowing whether the car to go down town would start out while we were in the middle of the track or not. Anyway, we got over to the car that was going up Clay. * * * Mr. Goodyear placing his left hand —no, his right hand—on the handle of the front vestibule of this car going out Clay, and his left foot on the icy step. The car gave a jerk, throwing Mr. Goodyear to the pavement, his right foot under the front wheel. When I saw him fall I hollered or rather hollered and then I hollered, and the car at the time was in motion, and I think, if the car had stopped when both Mr. Goodyear and I—" etc.

A witness named McCall testified:

"I was standing up about the center of the car. * * * The car started up and I felt a jar. * * * I heard some one say some one was run over. I got out of the car at the back door and Mr. Goodyear was lying on the pavement. * * * From the time the car started until it stopped it did not go over 6 or 7 feet."

We think it clearly manifest that plaintiff's testimony had sufficient probative force to establish his claim *prima facie*, and there was a conflict as to whether or not his case was made out entitling him to go to the jury.

It is urged that the verdict should be set aside because it is against the weight of evidence. But one of defendant's witnesses, Errick, saw any part of this accident. He testified to seeing deceased falling, and that the car ran 16 to 20 feet. This is in conflict with the testimony of Duford, who says deceased fell when the car made its initial start, and of McCall, who gives the whole distance the car ran as 6 to 7 feet. The four other witnesses of defendant testified as to the distance the car ran before it was stopped and where deceased lay after the accident, giving evi-

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dence from which the inference would arise that he attempted to board the car while it was in motion.

The conductor and motorman, whose duty it was to watch and take precautions to guard the safety of persons entering and leaving the car, had no knowledge of the accident until it was over. The conductor, who was in the middle of the rear platform, which was crowded with standing passengers, taking care of the trolley, testified that when he gave the signal to start no one was trying to get on the front platform "as far as I could see," and the car went 25 or 30 feet before he knew anything was wrong. Being asked, "*Q.* You don't know much about the accident how it happened?" witness replied: "No, sir; I don't."

The motorman testifies:

"These people went in the car, right in the vestibule with me, and some of those people were standing between me and the steps.

"*Q.* Did you ask those people if it was all right, if there was any person there, to go ahead?

"*A.* I could see that it was all right.

"*Q.* You could see over the heads of these people?

"*A.* Yes, sir.

"*Q.* And you saw the bottom step.

"*A.* No; but I could see they were all on. * * * There were men between me and the entrance; they were all holding onto the handles and feet on the steps, and they were doing that when I started the car.

"*Q.* You don't know whether there was a man then on the step or not?

"*A.* He was on the step.

"*Q.* He was on the step when you started?

"*A.* I don't know whether he was on the step, but some were on the step when I started.

"*Q.* You don't know whether Mr. Goodyear was there or not?

"*A.* I don't know."

It is an elementary rule that the credibility of witnesses and the weight to be given their testimony is

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for the jury. No attack was made upon the veracity of the various witnesses sworn, nor was any attempt made to impeach them, except as their testimony was in conflict. They were apparently disinterested witnesses, unless it were the conductor and motorman, of whom it could well be urged that their evidence was the least satisfactory and convincing. On this basic issue in this litigation the case turned upon the greater weight given by the jury to the testimony of witnesses on the one side or the other. The jury heard and saw these witnesses. On reading the evidence as a whole, we are not impressed that the same is so convincing and overwhelmingly conclusive in support of the defense as to render it imperative for the court to invade the province and customary prerogatives of the jury to set aside a verdict, rendered upon conflicting evidence, on the ground that it is unjust and palpably against the great weight of the testimony.

One of the reasons urged in support of defendant's motion for a new trial was the newly discovered evidence of a witness named Otto, whose affidavit was presented in support of said motion. When the motion came on to be heard, said witness was produced in open court for examination, on order of the trial judge. He testified to getting upon the Clay avenue car while it was standing and seeing a gray-haired man pass in front of the car after it had started and was moving slowly around the curve, following which the car stopped with a bump after it "had gone 5 or 6 feet or possibly more," and some one said it had run over a man. His testimony is in conflict with that of other of defendant's witnesses as to the distance the car ran before it was stopped and as to its being stationary when the Oakland car arrived. He testified:

"The car was slowly making the turn there, and

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the south-bound car coming down, and people got off, running around the front end of our car and a few got on, I imagine. Amongst those running around in front of the car I noticed an old gray-haired man. * * * I didn't inquire about what was the matter until I got to the shop, and some other fellows came in and they said it cut his leg off. * * * I could not see the bottom step from where I stood. I didn't see Mr. Goodyear when he started to go on the car. * * *

"*Q.* You don't know what the car was doing when he started to get on?

"*A.* No, sir."

The material portion of his testimony strongly urged is that deceased tried to board the car after it started and was going around the curve.

In denying the motion for a new trial, the court said relative to the claim of newly discovered evidence:

"The affiant, Henry H. Otto, was produced in court pursuant to the court's request, and his statement given. The most that can be said in its favor, I think, is that it is merely cumulative. It is not as strongly corroborative of defendant's theory as was the testimony given by the defendant's witnesses, who swore, at least inferentially, that the car in question was in motion when the deceased sought to board it. Had Mr. Otto been sworn upon the trial I do not see that the result would have been in any way affected; nor is it at all probable, in my view, that upon a new trial his testimony would change the outcome. Upon the authority of *Branch* v. *Klatt* I think the motion made in this respect should be denied."

We think the trial court correct in the conclusion that the newly discovered evidence was at best cumulative and not so strong and convincing as to render a different result probable upon a retrial of the case. Those are, however, primarily questions for the trial court, who heard and saw not only the witnesses at the trial but the newly discovered witness. The appellate court will not disturb the discretion of the

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trial court in such cases unless it is clear that the same has been abused. *Jones & Co.* v. *Tucker*, 132 Ala. 305 (31 South. 21); *Branch* v. *Klatt*, 173 Mich. 31 (138 N. W. 263). *Vide*, also, 29 Cyc. pp. 1008-1010, where a large number of cases are cited on the subject of newly discovered evidence. We do not find from this record an abuse of discretion which demands interference by this court.

The judgment is affirmed.

MOORE, MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

COLBORNE v. DETROIT UNITED RAILWAY.

1. CARRIERS—NEGLIGENCE—IMPUTED NEGLIGENCE—STREET RAILWAYS.

Negligence of the driver of an automobile in which plaintiff was riding is imputable to plaintiff, in an action for injuries resulting from a collision with a street car.[1]

2. NEGLIGENCE—AUTOMOBILES—CONTRIBUTORY NEGLIGENCE.

It was not erroneous for the trial court, in directing a verdict for defendant, to hold that the evidence showed that defendant's street car was lighted, upon the testimony of all defendant's witnesses and of one witness for plaintiff, uncontradicted except by plaintiff's testimony and that of the owner of the automobile in which she was riding, that they did not see the street car and saw no

[1] As to duty of operator of automobile when near street cars, see note in 38 L. R. A. (N. S.) 493.
On the question of imputed negligence of driver to passenger, see note in 8 L. R. A. (N. S.) 597.

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lights, the plaintiff admitting, however, that the car was lighted immediately after the accident.

3. SAME—DIRECTED VERDICT.

Evidence that plaintiff's companion, driving a motor car, looked both ways before crossing defendant's tracks but failed to see a lighted car approaching a short distance away in the block, although it was seen by a witness for plaintiff when it was nearly a block from the scene of the collision, that the automobile was proceeding slowly and under complete control, and that the evening was clear, the view unobstructed, and no passing vehicles distracted the attention of the driver, justified the direction of a verdict for defendant on the ground of contributory negligence.

Error to Wayne; Van Zile, J. Submitted June 16, 1913. (Docket No. 89.) Decided September 30, 1913.

Case by Harriet Colborne against the Detroit United Railway for personal injuries. Judgment for defendant upon a directed verdict. Plaintiff brings error. Affirmed.

Thomas J. Mahon and *Thomas W. Thompson*, for appellant.

Corliss, Leete & Joslyn (Wm. G. Fitzpatrick, of counsel), for appellee.

STEERE, C. J. Plaintiff brought this action *ex delicto* in the circuit court of Wayne county to recover damages for personal injuries sustained by her in a collision between one of defendant's street cars and an automobile in which she was riding. In the trial court, at the conclusion of the testimony, a verdict in favor of defendant was directed by the court, on the ground that the driver of the automobile was, as a matter of law, guilty of such contributory negligence as to preclude recovery.

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This accident occurred at the intersection of Oakland and Holbrook avenues in the city of Detroit on the evening of November 13, 1910, at about 5 o'clock, just as it was getting dusk, and shortly after lights in stores and on the streets were lit.

Plaintiff was out that evening with a friend named Kolchowsky, whose wife she afterwards became, taking a pleasure ride around the city in his automobile, which he was driving. He testified that he had lived in Detroit about two years, and was familiar, in a general way, with the city, but did not know, previous to the accident, that there were car tracks on Oakland avenue. This avenue runs north and south through the city, and is traversed by double tracks of defendant's line. Holbrook avenue crosses it at right angles.

In the course of their ride around the city, Kolchowsky was driving west on Holbrook avenue, and at its intersection with Oakland came upon defendant's west track just at the proper time to collide with a regular car upon that track going south. The drivers of the two vehicles each testify that the other ran into him. However that may be, it is made clear that both attempted to briefly occupy, for purposes of travel, the same spot in the highway at the same time, with disastrous results to the automobile and its occupants.

The negligence charged as ground of recovery in plaintiff's declaration is defendant's failure to have its car lighted and display proper signal lights, giving notice to persons about to cross the track that a car was approaching, and failure to sound a gong or other alarm for the same purpose.

There was testimony produced by plaintiff tending to support portions of this charge, and positive testimony was produced by defendant to the contrary, which it may be conceded raised an issue of fact for the jury, were it shown that plaintiff was free from

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contributory negligence, or had the testimony of plaintiff also presented an issue of fact for the jury on the latter question. But in order to recover plaintiff must allege and prove not only the negligence of defendant, but that she herself and also the party driving the vehicle in which she was riding were free from any negligence which contributed to the accident.

The trial court held and charged that the negligence of Kolchowsky, the driver of the conveyance in which plaintiff was a voluntary passenger, was imputable to her. Counsel assign error thereon, not overlooking former decisions of this court on that subject, but urging that those decisions should be overruled and a contrary view adopted, in harmony with numerous decisions cited from other jurisdictions. Were the question new or uncertain in this State, it might call for serious consideration; but the doctrine of *stare decisis* is not to be lightly disregarded. It was said in *Mullen* v. *City of Owosso*, 100 Mich. 103 (58 N. W. 663, 23 L. R. A. 693, 43 Am. St. Rep. 436), that, where a woman of mature years and discretion voluntarily entered the private conveyance of another to ride with him, and by his contributory negligence was injured, she must be held to have adopted his conveyance for the time being as her own and to have assumed the risk of his negligence, which must therefore be imputed to her. Though counsel there made the same contention as is made here, it was then said that this rule "has been too long settled to be now disturbed." The ruling of the trial court was in harmony with that case and the authorities there cited.

Plaintiff's crucial assignment of error and argument naturally center upon that portion of the charge in which the court directed a verdict for defendant, which is as follows:

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"The undisputed proof is that the car was lit inside, so that, assuming it had no headlight, as claimed by the plaintiff, this car could have been seen on this night more than a block away when the plaintiff arrived at Oakland street curb line, because he would have a clear view from there, where he could have had an unobstructed view up that street. He was at this point at least 22 feet away from the southwest track, on which the collision happened. This machine was running 6 miles an hour, and, as he testified, the machine could have been stopped, and he would, if in the exercise of ordinary care and prudence, have stopped his car and waited for it to pass. Had he looked when going onto the first track, he would have had 9 feet 8 inches to have stopped his car or automobile before he reached the track upon which the collision occurred. At that point the street car must have been very close, for he says that as soon as the front wheel [was] on the first track or east rail of the collision track, the car was right on him, and struck his car at the wind shield on one side or window. So that when he was on the first rail of the first track, 9 feet 8 inches away, the street car could not have been but a very few feet away. The automobile was going at 6 miles an hour. He neither stopped or turned aside for the street car. There is no proof of due care on the part of the plaintiff, and therefore, as a matter of law, the court must find the plaintiff guilty of contributory negligence."

It is urged that certain of the foregoing statements of facts made by the court are not undisputed, and others are but inferences drawn from evidence upon which honest judgments might differ and a jury might legitimately reach other conclusions.

Upon the subject of headlights, Kolchowsky testified that there were none on the car. When directly interrogated as to the car being lit inside, he stated that he saw no lights. He and plaintiff testified, in a general way, that the gong was not sounded, that they saw no lights, and the car was not lighted; they also testified that they did not see the car at all until just as it struck the automobile, and she stated that

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the car was lighted when she looked at it immediately after the accident. On cross-examination, in answer to the question, "But this car didn't have any lights on it or in it?" she said, "Well, I didn't see any." Plaintiff's witnesses to the accident were Kolchowsky, herself, and a man named Frank Bohn. The latter witness, who gave testimony that the motorman did not sound an alarm for the crossing, also testified that he saw the car coming over a block away from where he sat on the steps of a house on Holbrook avenue; that he saw it diagonally from his position, and did not see the headlights, but that it was plainly lighted inside, enabling him to see it by the lighted windows. In addition to this, the positive evidence of numerous witnesses of defendant is overwhelming that the car was lighted. The only suggestions to the contrary of its being lighted inside is the, in effect negative, evidence of the occupants of the automobile, who say they did not see the car at all until it was upon them, and did not see any lights before it struck them, while their own witness says it was by means of the lights that he saw the car over a block away. We think the trial court not in error when assuming the evidence clear and undisputed that the car was lighted on the inside.

A map of the locality, duly proven, was in evidence, and its correctness not questioned. The statement of the court as to measurements and distances was supported by the map and accompanying testimony, which was not disputed. The evidence in that connection showed that the widening vision along Oakland avenue, to one going west on Holbrook opened an unobstructed view northerly on Oakland of 150 feet when yet 48 feet east of a line midway between the tracks ahead, and when 12 feet nearer that line the view to the north up Oakland was unobstructed. Kolchowsky admits there was nothing in the highway on Oakland to interfere with his

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seeing along it as far as the condition of light permitted. Irrespective of the positive statements of defendant's witnesses as to how far the car could be seen that night if unlighted, and was seen as lighted, plaintiff's witness Bohn supports the statement of the court that the car could have been seen more than a block away. He said, "I saw it coming a little over a block, through the windows of the car," and that it was running about the usual rate of speed.

The testimony of plaintiff and Kolchowsky is not harmonious in certain material particulars. She testified that just before they came upon Oakland avenue they were talking together about a trip which they were planning for the purpose of visiting her brother on Thanksgiving day, a project mooted by her, and upon which Kolchowsky looked with favor, provided he could dispose of his roadster and get a touring car to journey in. The events immediately subsequent to this conversation are described by her as follows:

"Just when we come to the track, I says before we come to it, I says, 'Here is a street car track.' We both just looked like that, both like that, both ways. Well, we just got over that third rail, and just as our car seemed about just over the rail, and this street car track, it just seemed—I seen the other part of the car, just had a glance of it, and I hollered, and it struck the engine broadside, and it knocked him unconscious. The fire flew out of the engine, and it seemed as though I was thrown up and turned inside down, and we were both under the car and dragged. I couldn't tell the distance we were dragged.

"*Q.* You could not state the distance, but how far did this street car run after it struck you?

"*A.* Further—a man there came and raised part of it up, and I got out from under the car.

"*The Court:* You were submerged under the car?

"*A.* Yes, we were both under the car. The car was turned upside down—the auto. They had us pinned underneath, caught underneath, and we could

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not see at all, so then somebody came and lifted the auto off of us. There was a piece that run into my head here, and I got hold of that and pulled it out; pulled a piece of iron out of my head. The iron came near the right eye. My two legs were right through the bottom part of the car where the footboards are. The bottom of the car was broken, and my legs went right through. That is how I was pinned underneath the car. The man raised the side, and I got out; but then I said to them, I said: 'There is a man in there; take him out. Oh, he is under there.' He was under there; he was under the car."

Kolchowsky testified that he saw the car tracks ahead on Oakland when he was 100 feet away, and slackened down to 6 miles an hour or less, keeping his engine on high speed, and that going at 6 miles an hour he could stop in from 6 to 10 feet; that when within 25 or 30 feet of the tracks he looked both ways and listened, saw and heard nothing but the rumbling of his own machine, and continued on, looking again when, as he variously states it, he was 10 or 15 feet from the last track, just before he struck the first rail, nearly on the track, and discovering nothing started up speed to go across "as if nothing was there;" that he heard a rumbling, and looking to the right saw the street car coming 15 or 20 feet away, grabbed the emergency brake, but whether it did any good did not know for the car was too near on top of him, and struck his machine just back of the engine near the wind shield, and knocked him unconscious. The probability and verity of this narration is, of course, within the realm of facts; but, taking it as he tells it, within a distance from the track in which he could have stopped, he speeded up his car without looking again and started across as if nothing was there.

On cross-examination he testifies as to his observations and proximity to the track in part as follows:

"Q. At the time you saw this car 15 or 20 feet

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away from you, you were on the tracks—the tracks of the last track—the rails of the last track, I should say?

"*A.* Just about on the first rail, the front wheel.

"*Q.* The front wheel was just about on the first rail; that would be on the east rail of the south-bound track?

"*A.* Yes, sir.

"*Q.* From the time that you made your observation when you were 25 or 30 feet away from the tracks, the easterly track, the rail of the north-bound track, until the time that you—when your front wheels were right onto the south-bound track, and the car was 15 or 20 feet away from you, did you look again?

"*A.* No, I just heard the noise first. * * *

"*Q.* And at that instant of time when you first saw and heard the car, the car was, in your best judgment, from 15 to 20 feet away from you?

"*A.* Just about. * * *

"*Q.* Then just as soon as you got near the track you shot your power on in an attempt to get by, is that it?

"*A.* No, I attempted to go across as if nothing was there.

"*Q.* Well, then, you shot your power on in attempting to go by before you heard or saw the car?

"*A.* Yes, sir. * * *

"*Q.* Then you went about 10 feet, you think, and got so your front wheels were right on the easterly rail of the south-bound track when you saw this car or heard this car 15 or 20 feet away?

"*A.* Yes, sir; on the first track with the front wheels."

Asked on redirect examination how near he was when he took his last observation to assure himself nothing was coming, he answered, "It was probably about 10 feet, or something like that, probably 15."

Plaintiff and Kolchowsky were motoring down Holbrook avenue in the gathering twilight, in a portion of the city with which he was not familiar, crossing streets of which he was ignorant whether or not street cars traversed them. He states, "I was out

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that evening to demonstrate the car." Just before the final demonstration he was engaged in conversation with his companion, and future wife, planning to get a touring car in which they were to journey together to visit her brother on Thanksgiving. That this mutual contemplation of future events must have, to some extent, absorbed and diverted his active attention from the emergencies of their immediate environment is, at least, a legitimate inference, strengthened by plaintiff's testimony that she made the discovery they were in close proximity to a car line. She testifies: "When we got just near the track," also worded in another part of her testimony, "just when we came to the track, I says, 'Here is a street car track.'" He states that he looked and listened twice; that it was dark. He not only saw nothing, but heard nothing except his own engine. He did not stop. If it was dark, and the car not lighted, as he claims, its approach would be ascertained only by listening. The car certainly was then approaching, and very close upon him. His first look was, as he states in one part of his testimony, at a point so far back that he "could not see up the tracks," and again he said it was when he was "25 or 30 feet away," and he could see along Oakland avenue as far as the darkness permitted. His last look was when he was 10 or 15 feet from the track the car was running upon; he then increased his speed, and without looking again proceeded to cross as if nothing was there. It was a clear evening and he testifies that his sight and hearing were good. He knew he was approaching a place of danger where there were double tracks, upon which cars were liable to be running either way at any time. He did not know their times of passing. He knew he was perfectly safe on either side of that short danger zone, and, however close, he was perfectly free from that distracting solicitude as to his means of trans-

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portation being frightened by a passing car, so often urged in the case of horses under like circumstances. Before passing into the line of danger from his place of safety, where he had ample opportunity to observe without obstruction, it was his duty to assure and reassure himself "that there is not a car directly upon him, of which situation the fact that he is struck is conclusive proof." *Manos* v. *Railway*, 168 Mich. 155 (130 N. W. 664).

This is not of that class of cases in which the car has been seen, and the plaintiff, reasonably believing a crossing could safely be made, has attempted to cross, and been injured, owing to the fact that the car was run at an excessive rate of speed, or being otherwise negligently operated, and therefore the question of whether plaintiff, in the exercise of common prudence, might have reasonably judged there was sufficient time to pass became a question of fact, upon which opinions might reasonably differ. This is a case of a right angle crossing, over a double track of an electric railway line. As plaintiff approached the track, he says he saw it 100 feet away. The street was clear except for the oncoming car. There was no confusion of passing conveyances, or persons, or cars running on different tracks, to perplex. He could and should have made sure of the safety of proceeding, by looking just before entering upon the track, and at such a point that he could stop his machine if necessary in order to avoid a collision. This rule should be as strictly applied to an automobile as to a pedestrian, and the reasons for its application are more impelling. Usually the careless pedestrian only imperils his own safety.

In the light of common knowledge courts can well take judicial notice of the automobile, not only as a most useful and pleasing means of swiftly transporting persons and property for pleasure or business, when properly controlled and cautiously driven, but

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as a vehicle in its possibilities so destructive when in the hands of careless and reckless drivers as to spread over the land the maimed and dead until it has belittled the cruelties of the car of Juggernaut.

We think the conclusions reached by the trial court, in directing a verdict for defendant, find authority in principle in *McGee* v. *Railway Co.*, 102 Mich. 107 (60 N. W. 293, 26 L. R. A. 300, 47 Am. St. Rep. 507); *Borschall* v. *Railway Co.*, 115 Mich. 473 (73 N. W. 551); *Hilts* v. *Foote*, 125 Mich. 241 (84 N. W. 139); *Merritt* v. *Foote*, 128 Mich. 367 (87 N. W. 262); *Measel* v. *Railway*, 166 Mich. 688 (132 N. W. 453); *Stevenson* v. *Railway*, 167 Mich. 45 (132 N. W. 451); *Manos* v. *Railway, supra; Puffer* v. *Lighting Co.*, 173 Mich. 193 (139 N. W. 19); and other cases cited in these decisions.

On the record as an entirety we find no reversible error, and the judgment is affirmed.

MOORE, MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

In re OLDENBERG'S ESTATE.

OLDENBERG *v.* LEIBERG.

1. WITNESSES—PRIVILEGE—PHYSICIAN AND PATIENT—WAIVER.

In a will contest, it is the right of a contesting heir, under Act No. 234, Pub. Acts 1909 (5 How. Stat. [2d Ed.] § 12826), amending 3 Comp. Laws, § 10181, to waive the rule of privilege as formerly applied to testimony of an attending physician employed by decedent; for that purpose such heir is a personal representative of the estate.

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2. APPEAL AND ERROR — RECORD — WILLS — CONTESTANTS — HEIRS, WHO ARE.

For the purpose of determining who the contestants of a will are, and whether they were heirs at law of deceased within the meaning of Act No. 234, Pub. Acts 1909, the court may rely on the recitals of the writ of error, together with the statements of the will, in the absence of affirmative testimony on the point.

Error to Delta; Flannigan, J. Submitted April 8, 1913. (Docket No. 90.) Decided September 30, 1913.

Mary Oldenberg and others proposed for probate the will of Henry Oldenberg, deceased. Lizzie Leiberg and others contested. Proponents appealed to the circuit court from an order of the probate court disallowing the will. Judgment for proponents. Contestants bring error. Reversed.

A. H. Ryall (T. A. Sanderson, of counsel), for appellants.

Cummiskey & Spencer, for appellees.

OSTRANDER, J. In the circuit court the will of Henry Oldenberg, deceased, was allowed, reversing the decree of the probate court. The printed record does not disclose the names of the contestants or their relation to the deceased. An examination of the return to the writ of error in the clerk's office shows that the writ of error sued out by contestants names the proponents as Mary, Carl, and Paul Oldenberg, and Martha Kleist, and the contestants are Lizzie Leiberg, Fred, Charles, and Louis Wulf. In the instrument proposed for probate, Lizzie Leiberg is called a stepdaughter of deceased, and the only other legatee, John Oldenberg, is called a brother of deceased. The executor named in the will is Ira C. Jennings. It is to be inferred from the copy of the

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order made upon the petition for leave to appeal, which copy is returned with the writ of error, that Mr. Jennings is special administrator of the estate. He was a witness at the trial; but his testimony does not disclose his relation to the estate. The attorney for appellants states in the brief that the contest is between Lizzie Leiberg, one of the legatees, and four other nephews and nieces residing in Wisconsin and Canada, as contestants, on one side, and three nephews and nieces residing in Germany, "who, with the widow of the remaining legatee," are seeking to have the will sustained. "One of the next of kin, a niece, is not a party to the contest." In the brief for appellees, reference is made to the foregoing statement in the brief for appellants, with the remark that it nowhere appears in the record that any such relationship exists between the deceased and contestants. We have no further information upon the subject of who is proponent of the will.

Whether the rulings of the circuit court, assigned as error, were proper or improper depends upon the interpretation to be given to 3 Comp. Laws, § 10181, as amended by Act No. 234 of Public Acts of 1909 (5 How. Stat. [2d Ed.] § 12826), which, as so amended, reads as follows:

"No person duly authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient, in his professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: *Provided,* that after the decease of such patient, in a contest upon the question of admitting the will of such patient to probate, the heirs at law of such patient, whether proponents or contestants of his will, shall be deemed to be personal representatives of such deceased patient for the purpose of waiving the privilege hereinbefore created."

The matter added to the section by amendment is

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the proviso. The rulings complained about were made during the examination of Dr. Gross, decedent's attending physician, by the attorney for contestants; the record showing the following:

"What was he suffering from?" The answer was excluded upon the objection by proponents' counsel that it was privileged.

"*Q.* Did you prescribe any particular medicine or drugs to Mr. Oldenberg?

"*A.* Did I prescribe any particular drugs?

"*Q.* Or medicine for Mr. Oldenberg while you were treating him?

"*A.* Yes, sir.

"*Q.* Did you prescribe more than one drug?

"*A.* Yes, sir.

"*Mr. Ryall:* Merely for the purpose of following up the objection along that line, I want to ask this:

"*Q.* Do you know that any of these drugs or any part of those that you prescribed were given to Mr. Oldenberg?

"*A.* Yes, sir.

"*Mr. Cummiskey:* We object to that, for the reason that it is simply asked for the purpose of evading the statute and getting information from his doctor which is prohibited.

"*The Court:* I understand the objection, Mr. Cummiskey; but the serious question in the mind of the court is whether this line of testimony goes quite that far. On reflection, it seems to me that whatever is necessary to enable the physician to prescribe, and the prescription must be combined and excluded together, and I will strike out the answers of the doctor as to his having prescribed any drugs, and you may have an exception to this ruling, if you care for it—that the whole subject of the doctor's attendance and prescription is held to be privileged.

"*Mr. Ryall:* I want to offer to show by Dr. Gross, irrespective of any knowledge he had in the particular case, what would be the effect of uræmic poisoning.

"*The Court:* You heard what the court said on that subject before recess, and I am still of the opinion that under the circumstances of this case you should seek expert testimony from some other source.

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"*Mr. Ryall:* Do I understand that the ruling goes to the full extent that no expert testimony can be adduced from this particular physician? If it is, I do not want to be embarrassing the court or anybody else by asking for it.

"*The Court:* I think the court is safe in making that ruling. You have shown no inability to procure other expert testimony.

"*Mr. Ryall:* My offers, I want it clearly understood, are simply along the line of expert testimony on the evidence which is legitimately and admittedly in the case.

"*The Court:* It ought not to be necessary for the court to keep repeating to you that the objection is made and sustained to the use as an expert of the physician who attended the patient, according to the certificate already introduced in evidence, and that you ought to call some other physician unless that situation is waived by counsel.

"*Mr. Spencer:* We do not waive it; no sir.

"*Mr. Ryall:* Note an exception.

"*The Court:* I wish to ask you, Mr. Ryall, and you may answer it, if you care to, whether or not there are other physicians in the city who are procurable?

"*Mr. Ryall:* There are other physicians here.

"*The Court:* Well and good. Call the other physicians.

"*Mr. Ryall:* Q. Between the 5th day of August and the 10th day of August, 1910, did you treat Henry Oldenberg for any other disease than mentioned in the death certificate, namely, uræmia?"

The answer was excluded.

Assuming that heirs at law of deceased are both contestants and proponents of the will—we think the recital in the writ of error warrants this assumption—may the contesting heirs, or the proposing heirs, or either or any of them, waive the statute privilege of the deceased, the patient?

Before the statute was amended, it had been held by this court that information acquired by observation while the physician was in attendance upon his patient, as well as communications made by the

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patient to the physician, was excluded (*Briggs* v. *Briggs*, 20 Mich. 34), that the rule established by the statute is one of privilege, which the patient may waive (*Scripps* v. *Foster*, 41 Mich. 742 [3 N. W. 216]), and that what he may do in his lifetime those who represented him may also do for the protection of the interests they claim under him (*Fraser* v. *Jennison*, 42 Mich. 206 [3 N. W. 882]); but that, in a will contest between a legatee and a contesting heir at law, the heir at law is not the representative of the deceased, and is an adverse party, with no right to waive the statute privilege (*In re Mansbach's Estate*, 150 Mich. 348 [114 N. W. 65]). This being the state of the law, the legislature amended the statute in the manner hereinbefore indicated, and we hold, because we think no other ruling will give effect to all provisions of the amendment, that any heir at law, proposing or contesting the probate of a will, is, for the purpose of waiving the privilege, a personal representative of the deceased. With the wisdom of the legislation we have nothing to do, and therefore do not attempt to contrast the alleged beneficial with the harmful results which may attend the application of the statute in cases which may be supposed.

The judgment is reversed, and a new trial granted.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and BIRD, JJ., concurred.

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DETROIT TRUST CO. *v.* WORMER MACHINERY CO.

EQUITY—SALES—ADEQUATE REMEDY AT LAW—CONDITIONAL SALE—TRUSTS—RETAKING PROPERTY BY SELLER.

Defendant sold, under a contract reserving title to the property, a quantity of machinery to a motor car manufacturing company which later became insolvent. Before proceedings in bankruptcy were begun, defendant possessed itself of the machinery upon the default of the purchaser in making the stipulated payments. A resale of the property brought more than the unpaid balance, and the trustee in bankruptcy filed a bill for an accounting, claiming a substantial equity in the funds obtained at the resale, asking the court to construe the contracts and charging that possession was taken by force and without the consent of the insolvent. *Held*, that the averments of the bill charging a forcible seizure, etc., were not sustained by the evidence, that complainant had an adequate remedy at law and no trust existed in the proceeds obtained from the sale.

Appeal from Wayne; Codd, J. Submitted June 3, 1913. (Docket No. 16.) Decided September 30, 1913.

Bill by the Detroit Trust Company as trustee in bankruptcy of the Marvel Motor Car Company against the C. C. Wormer Machinery Company for an accounting and other relief. From a decree for complainant, defendant appeals. Reversed.

Anderson, Rackham & Wilcox, for complainant.

Denton Guinness, for defendant.

When complainant was appointed receiver of the Marvel Motor Car Company, which was in August,

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1907, it learned that certain machinery which the motor car company had purchased on contract from defendant had been removed from its plant by the defendant, and addressed to defendant a letter of inquiry, which was answered under date September 4, 1907, as follows:

"You state in your letter that you have in your possession the original contracts which are self-explanatory. The Marvel Motor Car Co. defaulted in its payments and in pursuance of the terms of the instruments we repossessed ourselves of the machinery and the Marvel Motor Car Company's rights therein were forfeited."

Thereafter, September 17, 1907, the Marvel Motor Car Company was declared bankrupt and complainant was elected trustee. On or before October 1, 1907, defendant disposed of the machinery. Two years later, complainant filed its bill in the circuit court, in chancery, for the county of Wayne, charging, among other things, that the Marvel Motor Car Company had a substantial equity in the said machinery, that defendant had denied its demand for an accounting for the same and its interest and equity in the same and in the proceeds of the sale thereof, and praying that an account be taken, construction of the contracts according to which the machinery was delivered to the said motor car company, and a decree requiring defendant to pay to it such sum as upon accounting should be found to represent the interest of the said Marvel Motor Car Company therein. It is charged in the bill that defendant repossessed itself of the machinery without demanding it, over the objections and without the consent of the Marvel Motor Car Company, and forcibly. The cause was heard in open court upon pleadings and proofs (an answer and replication having been filed) before the late Judge Rohnert, who died before making any decision. Thereupon Judge Codd, by consent of parties,

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examined the testimony and rendered an opinion and a decree favorable to complainant.

The Marvel Motor Car Company executed four instruments, pursuant to each of which machinery was delivered to it by defendant, and pursuant to which defendant claimed the right to repossess itself of the machinery and to hold the same and all proceeds of the sale of the same as its own. The dates and prices stated in these instruments are:

November 24, 1906	$3,015 40
January 2, 1907	1,660 90
February 28, 1907	768 70
May 7, 1907	1,066 52
Total	$6,511 52

The Marvel Motor Car Company had paid upon the purchases $3,650.52, and for the unpaid balances defendant held its 90-day notes. The sale of the machinery by defendant produced the sum of $5,284.07. Allowing defendant for the cost of taking possession the sum of $175.26, a commission of 15 per cent. for making the sales, and the balance of the purchase price $2,861, there was in its hands, as surplus, $1,481.49. Upon this sum the court allowed complainant as interest $310.65, entering a decree that defendant pay complainant the sum of $1,792.14, as of February 28, 1912.

The same provisions are found in each of the instruments executed by the Marvel Motor Car Company, and, excluding the list of machinery described therein, one of them is here set out:

"Received of C. C. Wormer Machinery Co. of Detroit, Wayne Co., Mich.: * * * Which the undersigned agree to safely keep, carefully use, and not remove from the city of Detroit, county of Wayne, State of Michigan. Also to keep the same insured in the sum of two thousand dollars for the benefit of said C. C. Wormer Machinery Co., in such company as they shall approve; also, to pay all taxes on said

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property during the continuance of this contract, and return same to the said C. C. Wormer Machinery Co., at its warehouse, Detroit, Michigan, free of charges and unincumbered, on demand, unless payments are made as below provided. And said undersigned further agree to pay to said C. C. Wormer Machinery Co., for said property, the sum of three thousand fifteen and 40/100 dollars with interest, from this date, at the rate of six per cent. per annum, to wit: One thousand fifteen and 40/100 dollars in cash upon the signing of this instrument, and the remainder as follows: One note dated Nov. 24, 1906 at 90 days for $2,000.00. At maturity of this note upon payment of one-half and interest a renewal note may be given for the balance at 90 days.

"It is hereby understood that the within contract is assumed by the Marvel Motor Car Co. according to the conditions of certain promissory notes of even date herewith, executed by the undersigned.

"It is understood and agreed that on payment of amount stated above, including notes, renewals and interest, together with any sum or sums which the said C. C. Wormer Machinery Co. may have paid for insurance or taxes on said property, by reason of the failure or neglect of the undersigned to keep the same insured, or pay the taxes thereon as above provided, then the said C. C. Wormer Machinery Co. shall execute to the undersigned a bill of sale of said property.

"It is expressly understood and agreed that the title to said above-described property shall remain in said C. C. Wormer Machinery Co. until the full sum herein mentioned, and all promissory notes and all renewals of notes, shall be paid. That said notes or renewals thereof shall not be considered as payments until such notes or renewals are actually paid in money; that said property shall not become a fixture by being placed in any mill or other building, or by being annexed in any manner to the realty; and that the rental value thereof is six hundred dollars per month, and which said sum the undersigned hereby agree to pay to the said C. C. Wormer Machinery Co., and if all of the several payments herein before provided for shall not be paid at the time and in the manner above provided the said C. C. Wormer Machinery Co. is authorized and empowered, at any time,

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to enter upon the premises, upon which said property is located, and take possession of the same either upon a violation of any of the agreements herein contained, or if the undersigned shall become an insolvent, or a bankrupt, or if any judgment be taken against the undersigned and the same shall not be paid or otherwise fully provided for to the satisfaction of the said C. C. Wormer Machinery Co., or if the said C. C. Wormer Machinery Co. should at any time during the continuance of this contract deem itself insecure; and any and all money already paid upon said machinery and property shall be considered as having been paid on account of the rental value and for the use of said property."

In the second instrument the rental value of the machinery was agreed to be $300, in the third $100, and in the fourth $300, a month. There was testimony concerning the rental value of machinery, the depreciation in value of new machinery after use, testimony tending to prove that the sums fixed as rental value for the machinery were intelligently agreed to by the persons acting for the purchaser, and that an exceptionally favorable resale was made of the property by defendant. The undisputed testimony is that if defendant had postponed a sale 60 days or more the selling price and the sums paid upon the contracts would not have equaled the original contract price.

OSTRANDER, J. *(after stating the facts).* The charge that forcible possession of the property was taken by defendant and that objections thereto were made by the Marvel Motor Car Company is not proved. On the contrary, it appears that one note fell due on August 7th, the day the removal of machinery was begun; that notice of a meeting of creditors of the Marvel Motor Car Company, to be held August 8th at 2 o'clock p. m., had been given; that defendant had information of the precarious financial condition of the Marvel Motor Car Com-

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pany, had been told by the manager of the Marvel Motor Car Company that it was not possible to meet the obligations of the concern; that no objection was made by representatives of that company to the retaking of the property by defendant. It was all retaken before 2 o'clock p. m., August 8th.

The testimony compels the conclusion that on August 7, 1907, when removal of the machinery was begun, all parties in interest had concluded that only a miracle could save the Marvel Motor Car Company and that it was proper for the defendant, before further complications had arisen, to repossess itself of the machinery. Indeed, there was an understanding between the defendant and the manager of the Marvel Motor Car Company that if the miracle was worked the machinery should be available to carry on the business. It was held for some time by defendant, awaiting developments. It is said in the brief for complainant:

"The contracts when the machinery was resold were still subsisting; defendant could not declare them void and does not pray here to have them declared void or its rights defined as in *Hickman* v. *Chaney*, 155 Mich. 217 [118 N. W. 993]. This surplus was therefore created by an unauthorized appropriation of property excusing vendee from a tender of the balance due as by its own act defendant was not in a position to redeliver the machinery."

It is further said in the brief:

"Complainant submits that under these facts and conclusions the retaking of the property and a resale created a fund which in equity imposes a trust relation between the parties hereto; that possibly the trust so imposed might give to complainant the entire sum realized on the resale but that complainant does not here urge, recognizing the rule that 'he who comes into equity must do equity,' and only asking that the equitable surplus be decreed to be due complainant. Counsel has made an elaborate research

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of the cases and fails to find a case where vendor has been shown to have a surplus under the circumstances of this case but herewith appends a synopsis of Michigan cases indicative of the conviction of the court that the vendee might have relief if the facts so warranted."

The Marvel Motor Car Company had no interest in the machinery, certainly none which was not defeasible by demand of possession or by voluntary surrender of possession; it had, at most, after the machinery was reclaimed, a personal claim against defendant. *New Home Sewing Machine Co.* v. *Bothane,* 70 Mich. 443 (38 N. W. 326); *Ryan* v. *Wayson,* 108 Mich. 519 (66 N. W. 370); *Wiggins* v. *Snow,* 89 Mich. 476 (50 N. W. 991); *Thirlby* v. *Rainbow,* 93 Mich. 164 (53 N. W. 159); *Wood* v. *Kaufman,* 135 Mich. 5 (97 N. W. 47); *Perkins* v. *Grobben,* 116 Mich. 172 (74 N. W. 469, 39 L. R. A. 815, 72 Am. St. Rep. 512); *McBryan* v. *Elevator Co.,* 130 Mich. 111 (89 N. W. 683, 97 Am. St. Rep. 453). Rejecting, as we do, all argument based upon the idea of an unauthorized retaking of the property, we necessarily reject the conclusions referred to in the foregoing excerpt from complainant's brief.

There is no trust fund. And there is no money due to complainant, unless, when the property was retaken, some of the money which had been paid to defendant by the Marvel Motor Car Company ought to have been returned to it. That defendant made a good second sale of the machinery concerns only the defendant; just as it alone would have been concerned if a bad sale had resulted in a loss in the entire transaction. It owed to the Marvel Motor Car Company, or its receiver, no duty to sell the machinery. It is clear, of course, that after defendant reclaimed the machinery it had both the machinery and $3,650.52 which the Marvel Motor Car Company had paid on account of the machinery. Whether

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it had the right to keep all or some of this money is the question suggested by the facts, as we find them. The money which had been paid was less than the sum which the vendee agreed to pay as rent. If the agreement to pay rent is enforceable, defendant had the right to keep all of the money. To determine this question, there was no occasion to resort to a court of equity. If defendant has money which in equity and good conscience belongs to the complainant, it is recoverable in an action of assumpsit. The contracts require no construction. They either are or are not enforceable according to their plain terms. There are apparent reasons for referring the matter to a court of law.

The decree of the court below is reversed, and a decree will be entered here dismissing the bill of complaint, with costs of both courts to defendant.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and BIRD, JJ., concurred.

EARL *v.* JACOBS.

1. APPEAL AND ERROR—INTERLOCUTORY DECREES—FINAL JUDGMENT.

   In determining whether or not an order is merely interlocutory, its effect upon the rights of the parties is the better test than the particular stage of the proceedings at which it is made: whenever such order divests a legal right, the injured party may appeal to determine whether it is legal or unauthorized.

2. SAME—SALE OF PROPERTY—EQUITY—APPEALABILITY.

   Thus, a court of chancery has no authority to enter an

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order permitting the trustee in bankruptcy of a stock of merchandise, adversely claimed by a mortgagee under foreclosure proceedings, to sell the merchandise at the request of the complainant, the bankrupt mortgagor, who seeks to enforce an alleged right or equity in the stock.

3. SAME—BANKRUPTCY—TRUSTEE.

The trustee stood in no better position than the bankrupt who commenced suit before adjudication of his bankruptcy and in whose stead the trustee was later substituted as party complainant.

4. BANKRUPTCY—SALE—EQUITY.

On appeal from an order entered in a suit in chancery to adjudicate the title of complainant to a stock of merchandise, after mortgage foreclosure, and bankrupt proceedings against complainant, it was *held*, improper to order the property, which was not perishable, to be sold by his trustee, and the funds held subject to a final determination of the questions involved; defendants' rights, if any, were to the property and not the proceeds of it.

Appeal from Kalamazoo; Knappen, J. Submitted June 6, 1913. (Docket No. 4.) Decided September 30, 1913.

Bill by Samuel Fishel, in whose stead Stephen G. Earl, trustee in bankruptcy of the estate of Samuel Fishel, bankrupt, was later substituted, against Abraham Jacobs and others for an injunction and other equitable relief. From an order permitting complainant to sell the property in litigation, defendant Jacobs appeals. Reversed.

Bernard B. Selling, for appellant.

Robert L. Campbell, for appellee.

OSTRANDER, J. Samuel Fishel, as sole complainant, filed his bill of complaint in the circuit court, in chancery, for Kalamazoo county, against Charles L. Jacobs and Samuel Samuels, as defendants, charging the defendants, among other things, with being

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in possession of a stock of goods, etc., which in equity belonged to complainant, of which he had been forcibly dispossessed, and which he feared defendants would dispose of or remove beyond the jurisdiction of the court. He asked for and obtained a writ of injunction restraining defendants from removing or attempting to remove any of the goods from the store building in Kalamazoo where they were then situated until the further order of the court. The bill was filed, and the injunction was granted and issued November 9, 1912. No effort to vacate or modify the injunction appears to have been made, and the store was not thereafter opened for business. Later, on November 13th, the complainant petitioned the court for an order appointing a receiver of the property, including the leasehold interest, to collect rents, to hold the property and dispose of it under direction of the court, bringing the fund created by the said collections and sales into court. An order to show cause why a receiver should not be appointed was made on the same day. The complainant, Earl, petitioned the court February 1, 1913, to be allowed to prosecute the suit, setting up that on December 10, 1912, in the Federal court for the western district of Michigan, upon a petition filed in said court November 20, 1912, the said Fishel had been adjudged an involuntary bankrupt, the petitioner had been duly elected trustee in bankruptcy, and had been authorized by the referee in bankruptcy to intervene in said suit. An order was made on the same day admitting said Earl to prosecute said suit as complainant.

The new complainant filed an amended bill of complaint February 6, 1913, adding to the parties defendant Alexander Friedman and Abraham Jacobs. He had also, on February 1, 1913, filed a verified petition in the cause, in which he stated that he was in possession of the said stock of goods and the store in

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which they were situated, that the store had been closed since November 9, 1912, the stock was deteriorating and would continue to do so, the rent of the store was $70 a month and a charge against the bankrupt's estate, and that, in his opinion, the goods and lease should be sold at public or at private sale, under the direction of the bankruptcy court, and the moneys thus obtained be retained until final disposition of the cause. He prayed for an order to defendants to show cause why he should not be authorized to sell the stock and fixtures and lease as trustee in bankruptcy, under the direction of the bankruptcy court. He further stated that one Abraham Jacobs had served notice on him that if he proceeded with such a sale he would be held a tort-feasor and be made defendant in an action to recover the value of the goods. An order to show cause was made, following which, on February 13, 1913, Charles Jacobs and Alexander Friedman filed their sworn answer to the bill, and on the same day Abraham Jacobs filed his several sworn answer to the bill. No other cause being shown why the trustee in bankruptcy should not be authorized to sell the property, the court, on February 19, 1913, made an order granting leave to sell the same, under the rules and regulations of the bankruptcy court, the money received to be held until the final determination of this suit, or until otherwise ordered by the court or by "other competent authority." From this order, defendant Abraham Jacobs claimed an appeal to this court.

It is sufficient to say, generally, that all rights of Fishel in and to the said property are denied. It is claimed that before the bill was filed it was duly sold on foreclosure of a chattel mortgage given by Fishel to Charles L. Jacobs, trustee, and that defendant Abraham Jacobs became the purchaser and is the owner of the goods. It is also claimed that many of the goods in the said stock had been furnished by

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Jacobs after the sale, and had never belonged to Fishel. Further than this, it is asserted that the trustee acquired possession of the store and goods by stratagem or by force; possession of them having theretofore been held by Abraham Jacobs. Counsel agree that the contemplated sale has been made. Complainant moved in this court to dismiss the appeal. It appearing that the cause would regularly be for hearing upon the calendar for the June term, consideration of the motion was deferred until the cause on appeal was reached. Whether the order appealed from is a final order, and, if it is, whether it should be set aside, are the questions presented.

A test for determining whether the order is merely interlocutory is well stated in the headnote to *Barry* v. *Briggs*, 22 Mich. 201:

"The effect produced by an adjudication in a chancery suit upon the rights and interests of the parties is a better test of its character—whether it be a merely interlocutory order or a decree—than the stage of the cause at which it is made; and whenever a legal right is divested by an order of a court of chancery, an appeal lies to determine whether it is legal or unauthorized."

See, also, *Taylor* v. *Sweet*, 40 Mich. 736.

In view of the charges in the bill and the statements in the sworn answers of defendants, it is somewhat difficult to understand why the court recognized the claim of the trustee in bankruptcy to be in possession of the property and in a position to make and control a sale thereof and to receive the proceeds of the sale. Everything which was before the court, excepting only the bare statement of the said trustee, indicated conclusively that Fishel was out of possession and some of the defendants in possession. Fishel so charged in the original bill, and the charge is not omitted in the amended bill. It was according to that theory that the injunction, which was

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still in force, was granted. The petition for and the form of the order suggests the idea that it was supposed the bankruptcy court had directed the trustee to assume possession, and that, with respect to possession and to control of the property claimed by Fishel to belong to him, the bankruptcy court exercised in some way a jurisdiction superior to that of the State court. It would seem as if, otherwise, the court, if it determined that a sale should be made, would have appointed some one to make it, would have required the sale to be reported and confirmed and the money received thereon to be brought into court.

When Fishel was adjudicated an involuntary bankrupt, this suit was pending. It is an adversary proceeding, involving the ownership of the property which the trustee has sold. The trustee in bankruptcy occupies no different position than Fishel would occupy if he had not been adjudicated a bankrupt. *Eyster* v. *Gaff*, 91 U. S. 521; *First Nat. Bank of Chicago* v. *Trust Co.*, 198 U. S. 280 (25 Sup. Ct. 693).

The chancery court has no general power to order a sale of property, adversely claimed, upon the application of one of the adversaries. A person seeking to establish his title to property has the right, generally, upon establishing his claim, to the property itself. The right is especially valuable when the property is a stock of goods contained in a building, the leasehold right to which is claimed as going along with the title to the goods. The order for the sale divested the appellant of his asserted rights. It reserved no control of the sale or of the proceeds thereof. At best, it, and the sale made pursuant to it, operated to substitute a sum of money, the amount of which depends upon various contingencies, for the property. The property was not perishable, and by no proper showing was it made to appear that the

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estate of Fishel was liable for any cost or expense of preserving or storing it.

It must be held that the order was improvidently made, was final and appealable. The motion to dismiss the appeal is denied, with costs to appellant. This court cannot set aside the sale; but appellant may have an order reversing the order of the court below and denying complainant leave to sell the property, with costs of this appeal.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and BIRD, JJ., concurred.

BAUER v. BAUER.

1. WITNESSES — PRIVILEGE — EVIDENCE — COMPELLING PARTIES TO TESTIFY—DIVORCE.

   No privilege is conferred by statute on either party to a divorce case so as to permit one to decline to take the stand as a witness upon the request of the other. As to many subjects, with the consent of the other party, the husband or wife may be examined and may be compelled to give testimony on competent matters, not excluded by statute. Act No. 307, Pub. Acts 1909; 3 Comp. Laws, § 8652 (4 How. Stat. [2d Ed.] § 11489).

2. DIVORCE—ATTENDANCE OF WITNESSES—EVIDENCE.

   In divorce proceedings it is not required that the husband, being a party complainant, attend at the hearing. Without any request for a continuance or any previous effort to secure the testimony of the husband, the defendant was not entitled to a decree in her favor because of complainant's omission to be present; and although she was entitled to compel his attendance as a witness, in the

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absence of any effort on her part to do so the court properly refused to enter an order requiring complainant to give testimony.

Appeal from Barry; Smith, J. Submitted June 10, 1913. (Docket No. 61.) Decided September 30, 1913.

Bill by Charles Duane Bauer against Charlotte Bauer for divorce. Defendant filed a cross-bill for a divorce. From a decree for complainant, defendant appeals. Affirmed.

Colgrove & Potter, for complainant.

Reuben H. Rossman and *Thomas Sullivan,* for defendant.

OSTRANDER, J. The bill is filed for a divorce. There was an answer in the nature of a cross-bill, in which defendant also asks that the marriage be dissolved and for alimony. There was an answer to the answer. The testimony was taken in open court, and complainant had a decree, which also settled property rights.

In this court a legal proposition is advanced which demands attention. When the cause was heard, complainant did not appear in court, and the inference —the natural one perhaps—is drawn by defendant that he was not in the State. During the hearing, defendant moved the court as follows:

"May it please the court, I want it to appear on the record that during the trial of this case and up to the present time that complainant has not been in the courtroom; that his witnesses that have been questioned do not seem to know his whereabouts, and we request an order of the court that he appear in this court to be examined by defendant's solicitors in regard to the statement put in his mouth by Charles H. Bauer; also to be examined regarding his nervousness, or the condition of his looks, and the situation

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between him and Guy in regard to this dissolution of the partnership and the assignment testified to by C. H. Bauer."

Other reasons were assigned. Later counsel for defendant said:

"We also feel, if we are required to make a defense in this case, that complainant should be required to appear in this court and submit to an examination regarding the allegations he makes against this woman; that for him to conceal himself—conceal his whereabouts and put himself in a position where we cannot even take his testimony by deposition or make him a witness in our behalf—is not only a fraud on the court, but it is an absolute fraud against the defendant in this case. For that reason we think the court ought to say at this time as to whether or not he should appear."

The order was refused. In this court, in addition to the general proposition that a suitor in a court of equity who does not attend at the trial ought to be denied relief, it is urged that defendant had the right to the presence of her husband in court in order that she might examine him as a witness in her own behalf, under the provisions of Act No. 307, Public Acts of 1909 (5 How. Stat. [2d Ed.] § 12865). The power of the court, under the rules, to compel a party to testify in such cases (see 1 Comp. Laws, § 211 (4 How. Stat. [2d Ed.] § 11708); *Hamilton* v. *Hamilton*, 37 Mich. 603; *Eaton* v. *Knowles*, 61 Mich. 625 [28 N. W. 740]; *Page* v. *Page*, 51 Mich. 88 [16 N. W. 245]) is not involved.

Complainant defends the action of the court upon the ground that under 3 Comp. Laws, § 8652 (4 How. Stat. [2d Ed.] § 11489), the parties to a divorce suit may determine—elect—whether they will testify, that 3 Comp. Laws, § 10213 (5 How. Stat. [2d Ed.] § 12857), confers no new rights upon either the husband or wife, nor does it modify or conflict with section 8652; and that Act No. 307, Public Acts

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of 1909, confers no new rights in this respect upon parties to divorce proceedings. In other words, the ruling is defended upon the ground that in divorce cases the husband and wife have the right to elect whether they will be witnesses. There is no such right; the right to refuse, generally, to testify being distinguished from the statute privilege to decline to give testimony of a certain kind. The argument takes no account of the fact that parties to suits, divorce and other, are generally competent witnesses, and may not testify generally in divorce proceedings only because a wise public policy has imposed restrictions. As to some, and indeed as to most, matters, a husband may be examined as a witness for or against his wife with her consent. Here the wife consents, demanding that the husband be produced as a witness. If complainant had been present in court, defendant might have called him as a witness, and, subject to the statute restrictions, he would have been a competent witness, and could, and should, have been compelled to give his testimony.

But there is no rule which requires parties to a suit to attend court during the trial. If the testimony of a party is desired by the opposite party, attendance at the trial may be secured by the process of the court, or a deposition may be taken as in other cases. The probability that a party will attend court during the trial of his own cause may excuse a failure to exercise the diligence in securing his attendance usually required in securing attendance of witnesses. If, owing to inability to procure the attendance of the opposite party, a continuance is asked for, the fact that he is a party may affect the discretion of the court. As a general proposition, a party to a suit must secure the attendance of his witnesses at the trial, as well when they are opposite parties or the agents or servants of opposite parties as when they are not. Appellant did not move for a continuance.

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She did not ask the aid of the court to discover the whereabouts of the complainant for the purpose of taking his deposition. As she herself was seeking a divorce, it is doubtful if a continuance was desired. The ruling she did ask for was properly refused.

Upon the merits, we are of opinion that the decree should be, and it therefore is, affirmed.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and BIRD, JJ., concurred.

DEVICH v. DICK.

1. TRIAL—ARGUMENT—CONDUCT OF COUNSEL.
The action of the trial court in charging the jury not to consider improper comments of plaintiff's counsel in arguing the case, having reference to defendant's wealth, cured the error, so as not to require a reversal of the judgment.

2. EVIDENCE—PRIVILEGED COMMUNICATIONS—ATTORNEYS.
The court rightly excluded from the evidence any cross-examination of plaintiff relating to disclosures made by plaintiff to defendant's attorney on an occasion when plaintiff visited the attorney for advice in a professional capacity before commencing suit, although the lawyer refused to accept the case.

3. PRINCIPAL AND AGENT—CONTRACTS—AUTHORITY OF AGENT.
Testimony that defendant hired a head bartender who conducted the business in defendant's absence, and employed plaintiff to assist him, that he exercised the power of hiring and discharging help and defendant knew that plaintiff was working in defendant's saloon, that the head bartender had been told by defendant to engage assist-

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ance, *held*, to present a case for the jury as to the contract of employment.

4. HUSBAND AND WIFE—CONTRACTS—JOINT PARTIES.

Where plaintiff claimed that defendant employed him and his wife at $60 a month, including $10 per month for the services of the wife in running a boarding house, the court did not err in submitting to the jury the question whether the contract was divisible or joint, and in charging that if the contract was joint and the head bartender employed both to work for himself, plaintiff could not recover; if the former had no authority to hire plaintiff as bartender, the verdict must be for defendant; if he engaged plaintiff for $50 a month as bartender and the jury found he had authority to engage a bartender, plaintiff could recover on the contract of employment.

Error to Gogebic; O'Brien, J., presiding. Submitted June 11, 1913. (Docket No. 81.) Decided September 30, 1913.

Assumpsit in justice's court by Mike Devich against Frank Dick for services as defendant's bartender. From a judgment for plaintiff, defendant appealed to the circuit court. Judgment for plaintiff. Defendant brings error. Affirmed.

Julius J. Patek, for appellant.

James A. O'Neill, for appellee.

STEERE, C. J. This is an action in assumpsit, originally brought by plaintiff in a justice's court of Gogebic county for the purpose of recovering approximately four months' wages as bartender, claimed to be due him from defendant. Before trial in justice's court plaintiff declared orally on all the common counts in assumpsit, filing a bill of particulars stating his demand to be for "services rendered by plaintiff for defendant during the months of November and December, 1909, and January and February,

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1910, at $50 per month, amounting to $180." Defendant orally pleaded the general issue.

On March 25, 1910, trial was had in justice's court, resulting in a judgment in favor of plaintiff for $180 and costs. Defendant removed the case by appeal to the circuit court of said county, where two jury trials were had. The first trial in that court resulted in a verdict and judgment for plaintiff in the sum of $173. Defendant thereupon made a motion for a new trial, which was granted November 13, 1911; the verdict and judgment being set aside for reasons which are immaterial here. On May 22, 1912, a retrial again resulted in plaintiff's favor; a verdict and judgment being rendered for him in the sum of $180.78. Defendant again moved for a new trial. On November 16, 1912, this motion was denied, and he has now removed the proceedings to this court for review upon a writ of error.

The services for which plaintiff recovered judgment are claimed to have been performed for defendant in the capacity of bartender in a saloon which defendant owned, located in a district of the city of Ironwood, Gogebic county, known as Jessieville. This saloon was so situated and conducted that its patronage came mostly from foreigners working in and around adjacent mines; their nationality being chiefly Croatian, Polish, and Finnish. It is undisputed that defendant owned the saloon, and the business was conducted in his name; he having complied with all the requirements of the law essential to qualify as such proprietor. He was absent from the place, however, most of the time, being manager of the Ironwood Brewery, which position, as he testified, demanded most of his time and attention. He employed in the saloon a man named Simonich, who had previously managed a saloon for others in the same building for several years. Defendant defines him as

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the "head bartender." The scope of his authority is in issue.

Plaintiff is a Croatian and, prior to the time he met favor in Simonich's sight, was a toiler in the mines. In the fore part of November, 1909, Simonich did him the honor to tender him the position of associate bartender in defendant's saloon, which he accepted. He left the mines and was employed in and around the saloon from November 14, 1909, to February 22, 1910, which historic date takes further prominence in being adverted to by defendant and other witnesses as "the time when Simonich skipped." The circumstances under which plaintiff terminated his connection with the institution are stated by defendant as follows:

"When I found that Simonich had gone away I went out to the saloon. Nobody was in the saloon but strangers. No bartender there at all. I went through the dining room and through the kitchen and across the alley into the house where Mrs. Simonich lived. * * * When I went back into the saloon I found the plaintiff behind the bar and I told him to get out. * * * When I went into Mrs. Simonich's house she was crying and they were talking loud and it kind of looked to me in a threatening way by their actions. I asked Mrs. Simonich what was the matter and she said, 'Mike is threatening me; he wants me to pay him;' and I chased the whole outfit out of the house."

It is the contention of plaintiff that Simonich, who was in charge of defendant's saloon and running it as defendant's agent, hired him to work there at $50 per month, promising that defendant would pay him; that more than one barkeeper was necessary there and Simonich had authority to employ the necessary help. Defendant denies that Simonich had such authority, claims he was only "head bartender," and that defendant himself personally ran the saloon and hired his bartenders. This question of agency is the

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important issue in the case. The court submitted it to the jury, under appropriate instructions, as an issue of fact. The testimony is quite voluminous and conflicting, and the briefs of counsel are swelled with lengthy excerpts from the testimony, with various portions liberally italicized and capitalized. The exhaustive briefs of defendant's counsel contain many ingenious arguments and numerous sound and settled propositions of law, more or less in point, but the case as an entirety impels to the conviction that the paramount issue is ultimately one of fact.

The principal errors relied upon and argued by defendant's counsel are: Unfair conduct by plaintiff's counsel calculated to prejudice defendant with the jury; refusal of the court to permit defendant to show previous contradictory claims of plaintiff; refusal of the court to direct a verdict for defendant; certain portions of the charge relative to knowledge and agency; and the refusal to grant a new trial on the ground that the verdict was against the weight of evidence.

The unfair conduct of counsel, argued as prejudicial, consists of certain references made before the jury to the alleged wealth of defendant. Certain reflections in the argument of plaintiff's counsel along those lines were improper and hazarded the interests of his client. If they were not corrected by the court and error was properly assigned upon them, a reversal on that ground would be a subject of serious consideration, but the court cautioned the jury to disregard them; that they had "nothing to do in this case with the question of the poverty or wealth of either plaintiff or defendant;" and we find no assignment of error which properly presents the question.

Exception to the court's refusal to allow defendant to show previous contradictory claims of plaintiff relates to rulings made in sustaining objections

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to certain questions asked plaintiff on cross-examination touching communications between defendant's counsel, who was conducting the examination, and plaintiff at a time prior to the commencement of this action, when plaintiff and his wife visited said counsel's office to consult him in regard to this case and to engage his professional services. Counsel stated to the court that plaintiff then made a statement of facts, to which he listened; that he there declined to take the case and was not retained; that he proposed to show that plaintiff then made "contradictory statements." Objection to this line of inquiry was sustained on the ground that such communications were privileged. We are of opinion that such testimony was rightly rejected. It clearly appeared that plaintiff visited counsel at his office before this action was brought to consult him professionally and retain his services. The communications then made, and which counsel sought to disclose, were made during a conference for the purpose of establishing the relation of attorney and client in this very case. Tentatively, and until counsel declined to take the case, such relation did exist. The communication related to matters in which the professional services of counsel were desired and asked.

"If a person, in respect to his business affairs or troubles of any kind, consults with an attorney in his professional capacity, with the view to obtaining professional advice or assistance, and the attorney voluntarily permits or acquiesces in such consultation, then the professional employment must be regarded as established, and the communication made by the client, or advice given by the attorney under such circumstances, is privileged. * * * It is the consultation between attorney and client which is privileged and must ever remain so, even though the attorney, after hearing the preliminary statement, should decline to be retained further in the cause, or the client, after hearing the attorney's advice, should decline to further employ him." 10 Enc. of Ev. 228.

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See, also, *Foster* v. *Hall*, 12 Pick. (Mass.) 89 (22 Am. Dec. 400); *State* v. *Tally*, 102 Ala. 25 (15 South. 722).

It is not essential to such relation that any fee be paid, promised, or charged, and such communications are privileged, even though the attorney who was consulted and not retained, as claimed in this case, accepts employment from the party adverse to the person making the communications. *Mack* v. *Sharp*, 138 Mich. 448 (101 N. W. 631, 5 Am. & Eng. Ann. Cas. 109); *Cross* v. *Riggins*, 50 Mo. 335.

The assignments of error based on refusal of the court to direct a verdict for defendant and to set aside the verdict rendered as against the weight of evidence present defendant's claim that there was no evidence of Simonich's authority as agent to hire plaintiff which could be submitted as an issue of fact to the jury; and, even should the court find that such evidence appears, the same is so weak and contradictory that a verdict based upon it cannot stand against the positive testimony of the defense to the contrary.

A careful review of the evidence shows clearly that there was abundance of conflicting testimony to present a plain issue of fact for the jury on this question. Not only do many undisputed facts and circumstances in relation to Simonich's employment in the saloon, and the manner in which he conducted the business done there as apparent manager, raise a fair inference of fact, but there is his positive and direct testimony that he was the manager, in charge for defendant, with authority to hire and discharge bartenders; that defendant came there but once or twice a week, staying only from half an hour to an hour, and took an inventory monthly. As to Simonich's authority to hire bartenders, he testifies in part:

"Whoever I thought could draw trade I hired them and he didn't make no kick.

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"Q. Dick gave you that authority?
"A. Yes. * * *
"Q. Then you employed Devich for Dick?
"A. Sure, Dick had to pay one bartender.
"Q. And you put Devich on Dick's account?
"A. Yes. * * *
"Q. When you hired this plaintiff, Devich, you said you wanted him to come and work for you?
"A. Yes, sir.
"Q. You put him in there to tend bar; you told him just the same as you told any other bartender? You simply said, 'Come to work for me.' Is that a fact?
"A. Yes.
"Q. On various occasions you hired bartenders, didn't you?
"A. Yes, sir; I did.
"Q. You hired them yourself?
"A. Yes, sir.
"Q. You paid them?
"A. Yes.
"Q. You had authority from Dick to do so?
"A. Yes, sir.
"Q. Did Dick ever hire a bartender?
"A. No, sir. * * *
"Q. And you fired them?
"A. Yes, if I had reason. * * *
"Q. Without consulting Dick or anybody else, you did that, did you not?
"A. Yes, if a man didn't suit me, I fired him and told him to go to the brewery and get his money. * * *
"Q. Dick knew that you were exercising the power of hiring and firing?
"A. Yes, sir."

Plaintiff testified positively that he was hired by Simonich to work in the saloon at $50 a month; that he worked there tending bar during the time for which he demanded pay, and that he had not been paid; that defendant had often seen him there at work; had talked with him about the amount of business done there in comparison with other saloons; and on two or three occasions plaintiff had accompanied

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defendant from the saloon to the street car when he had asked for some one to attend him. This testimony is disputed by defendant, who testified that he himself was in active, personal charge of the saloon; that he hired the bartenders and ran the business himself; that he never hired plaintiff nor authorized his hiring and did not know he was employed as a barkeeper working for him; that Simonich claimed plaintiff and his wife were working for himself. Defendant also testified that his duties as manager of the brewery took most of his time; that he visited the saloon once or twice a week; that he had seen plaintiff tending bar there on certain occasions; that Simonich, without consulting him, had before hired one bartender whom defendant paid, though Simonich had orders not to hire them without doing so, except that he was given authority to hire extra ones temporarily, in times of rush, around pay days.

Without going into further details, it may be conceded that inconsistencies and contradictions of more or less importance can be pointed out in the testimony of both plaintiff's and defendant's witnesses, who were mostly, if not all, foreigners, but we are impressed that many of the lengthy arguments along that line found in defendant's brief are more properly for the jury than the court. The conflicting testimony as to Simonich's authority fairly raised the issues of fact which were left to the jury by the court.

Plaintiff testified through an interpreter, and other witnesses manifestly either did not clearly understand the import of many questions asked them or they were unable or unwilling to give direct and intelligent answers. With the class of witnesses testifying on both sides in this case, the advantage of personal observation, in seeing them and listening to their evidence as it develops, becomes of more than usual importance. The trial court and the jury had this distinct advantage over one who can only read

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the record, and we are far from convinced that the verdict was unjust or so against the overwhelming weight of evidence as, under the principles so often set forth in former decisions, to impel this court to overrule the discretionary action of the trial court in refusing to grant a new and fourth trial.

It was the claim and theory of the defense that Simonich hired plaintiff and his wife together for $60 a month to work for him in a boarding house run by Simonich's wife in the same building as the saloon; plaintiff to also assist in the saloon, when wanted. There was some testimony to that effect. Plaintiff on cross-examination testified that he and his wife were hired by Simonich for $60 per month, but he also testified that his wife was hired to work in the boarding house for $10 per month and he was hired to work in defendant's saloon for $50 a month, and that Simonich said defendant would pay him. Exception is taken to portions of the charge dealing with this phase of the case wherein the court, after stating defendant's claim, said:

"On the other hand, plaintiff claims that while he and his wife were employed together, he was to be paid $50 a month, and that Dick was to pay him, and that his wife was to be paid $10 a month. If that was true, if Simonich had authority to employ plaintiff for Dick, and plaintiff was to be paid $50 per month, then, of course, plaintiff would be entitled to recover."

It is urged that the court in centering his instruction upon this proposition lost sight of other facts which were material to a proper understanding of the issue. The portion of the charge quoted, read with the charge taken as a whole, was not misleading or erroneous, and, without reviewing them at length, the same is true of other extracts from the charge quoted and excepted to. Immediately following the above quotation the court further said:

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"If not, and if it was simply a joint contract with no division, and Simonich employed the two of them together to work for himself, then I charge you the plaintiff cannot recover in this case. * * * If he was employed by Simonich to work for Simonich he must look to Simonich for his pay."

After a somewhat detailed review of the case in its various aspects, with a statement of the issues involved and the general rules of law applicable to such cases, presented in different lights, the court finally said:

"To recapitulate: You will first determine whether Simonich had power and authority to hire the plaintiff as bartender to work in that saloon. If he had no such power or authority, then, gentlemen of the jury, even though he did hire the plaintiff to work as bartender, your verdict must be for defendant. If you find by a fair preponderance of the evidence that Simonich had power and authority to employ the plaintiff to work as a bartender for Dick, you may proceed to determine whether or not he exercised such power by hiring this plaintiff to work as such bartender for Dick. If you find by a fair preponderance of evidence that he did so, and that he entered into a contract with the plaintiff in behalf of Dick for plaintiff to work as bartender in that saloon for $50 a month, then, gentlemen of the jury, it would be your duty, having found those two facts in favor of the plaintiff by a fair preponderance of the evidence, to render a verdict in his favor."

We think the charge of the court, as an entirety, was not misleading, contained no reversible error, and properly presented to the jury the issues of fact involved, with the rules of law by which they should be governed in passing upon them.

The judgment is affirmed.

MOORE, MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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BRANDT *v.* LUCE.

1. EQUITY—JURISDICTION AS DEPENDENT UPON AMOUNT IN CONTROVERSY—TAXATION.

   On demurrer to a bill filed by a number of taxpayers, averring that their interest in the subject matter exceeded $100, and seeking to restrain performance of a number of contracts for machinery to be used in county road improvements, the point that the bill fails to show jurisdiction as to amount or value was properly overruled: if it should appear upon the taking of proofs that the complainants have no such interest as to satisfy the requirements of the statute, the objection may be tenable.

2. HIGHWAYS AND STREETS—COUNTY SYSTEM—COMMISSIONERS—STATUTES.

   The board of county road commissioners, under Act No. 283, Pub. Acts 1909 (2 How. Stat. [2d Ed.] § 2173 *et seq.*), are required to file in the office of the county clerk the reasons for not letting highway construction by contract and for proceeding by day labor, before they may construct the highways, and an estimate is required specifying and itemizing the roads and parts of roads on which money is to be expended: no express power is conferred to enter upon the business of road building.

3. SAME—POWERS OF COMMISSIONERS.

   And under section 10 of the act the board may employ superintendents, engineers and others and buy proper machinery, tools and materials for the purpose of carrying out their work, and this power may be exercised wholly or partly when contracts for road building are let, or when bids have been rejected and work entered upon by day labor.

4. SAME—BILL OF COMPLAINT—TAXPAYER'S SUIT.

   Where complainant's bill of complaint did not show that the preliminary steps required by the statute had been omitted by the board, and machinery had been purchased under contract, but it was charged that the county road commissioners could not lawfully contract for machinery of more than the value of $500 without advertising for

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bids, and that they had attempted to do so, the averments of the bill did not state any ground for relief: the power to purchase machinery was not limited by the clause set up by the pleader, and the general authority or duty to keep the highways in reasonable repair supported the exercise of authority by the commissioners.

5. SAME—CONTRACTS—APPROPRIATIONS.

After the supervisors had provided for a tax of $40,000, the board of road commissioners did not exceed its authority in contracting for $22,000 worth of machinery to be paid for at stated intervals during three years, without interest, under section 21, prohibiting the board from contracting any indebtedness in excess of moneys on hand or of three-quarters of the taxes voted. Appropriations made by the commissioners are to be treated as appropriated from such funds as the board had a right to appropriate and the contracts for machinery are therefore valid.

Appeal from Branch; Knowlen, J. Submitted June 13, 1913. (Docket No. 105.) Decided September 30, 1913.

Bill by Harry Brandt and others against Emery G. Luce and others for an injunction, etc. From an order sustaining a demurrer to complainants' bill, complainants appeal. Affirmed.

Palmer, Palmer & Palmer and *H. H. & B. E. Barlow*, for complainants.

C. C. Johnson and *Lockerby & Bowen* and *Orrin M. Bowen*, for defendants.

OSTRANDER, J. In the year 1912 the county of Branch adopted the county road system, pursuant to the provisions of Act No. 283, Public Acts of 1909 (2 How. Stat. [2d Ed.] § 2173 *et seq.*). County road commissioners were appointed to act until others should be elected in April, 1913. Those appointed qualified and entered upon the duties of the office. A

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tax of two mills upon each dollar of assessed valuation of property was voted, was spread upon the rolls, has been collected, and is in the treasury of the county. The sum is about $40,000. At various times, from December 31, 1912, to March 18, 1913, the said commissioners entered into contracts for the purchase of machinery to be used in constructing roads, the purchase price aggregating about $22,000, by the terms of some of which contracts some of the payments are deferred and are to be made, without interest, in the years 1914, 1915, 1916. No bids or sealed proposals for furnishing the machinery were advertised for, and there was no open competitive bidding for the same.

Before any payments fell due, and on or about April 1, 1913, fourteen residents of the county, taxpayers therein, filed their bill of complaint, setting up the foregoing facts, with various conclusions of law and fact, making the board of county road commissioners, the individual members of the board, the several vendors in said contracts, the clerk of said board, and the county treasurer parties defendant, seeking to have the said contracts declared invalid and to restrain performance thereof on the part of the board and the county. The defendants joined in a demurrer to the bill, assigning, specifically, as reasons for demurring that complainants do not allege such an interest in the matter as to give the court jurisdiction, that it appears by the bill that the actions of the board of county road commissioners complained about are lawful, and the contracts they have made are valid. After hearing, the demurrer was sustained, and a decree dismissing the bill was entered. The reason for sustaining the demurrer does not appear. No complaint is made that complainants were denied the right to amend the bill. See *Macomber* v. *Cottrell*, 162 Mich. 718 (128 N. W. 796).

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Complainants present in this court two principal propositions:

(1) That the allegation of the interest of complainants, which is "that the interest of complainants in the matters involved in this suit exceeds the sum of $100," is sufficient, on demurrer, to sustain jurisdiction; (2) that a misuse of public funds is charged, because *(a)* the commissioners could not lawfully contract for machinery of more than $500 value without advertising for bids, and *(b)* they could not incur an indebtedness to be paid out of future tax levies not yet voted by the supervisors.

1. Counsel seem to be agreed that the suit concerns property, and is one of the class of suits which, under 1 Comp. Laws, § 435 (4 How. Stat. [2d Ed.] § 11952), courts of equity must dismiss, unless the matter in dispute exceeds $100. We have held *(McManus* v. *City of Petoskey,* 164 Mich. 390, 391 [129 N. W. 681]), that, when complainant, as a taxpayer, seeks to restrain a misuse of a public fund, he must show that his interest in the fund, or the threatened damage to his property interests by its misuse, amounts to $100, or that he has land worth $100, which, in consequence of the misuse of the fund, may be sold to satisfy, or be liable to a lien for, a tax.

As was pointed out in *Brassington* v. *Waldron,* 143 Mich. 364, 365 (107 N. W. 100), the statute does not make an allegation of the amount in dispute jurisdictional. The question is whether the bill containing the allegation above set out, with the one that complainants are taxpayers, is good on demurrer for want of proper interest. We think it is good. If it should appear that complainants, as taxpayers, have no such interest in the fund, or in the consequences of a threatened misuse of it, as to satisfy the statute, the objection may be made at the hearing.

2. In various portions of chapter 4 of the act powers are conferred, and duties and limitations of pow-

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ers are imposed, upon boards of county road commissioners in such terms and with such arrangements of the sections that, unless amendments are made, there must forever be some uncertainty respecting the legislative intention. To the extent, and in the proportions, that the legislative language leaves the legislative meaning doubtful, interpretation and construction of an enactment is both a delicate and difficult task. It is especially a delicate task when, as in this case, the attack upon the conduct of a public board, undoubtedly possessing large and most important powers, is predicated upon so meager a showing of the facts which must have attended the action complained about. It is with reluctance that in such cases as this the court undertakes to determine whether public officers have exceeded their powers or have exercised powers not conferred upon them; the reason will become more apparent when the charges in the bill of complaint are read in connection with the voluminous provisions of the act.

Of the provisions involved in the contention of complainants, we set out, for convenience, section 19, a portion of section 20, section 10, and section 21 [chap. 4]:

"SEC. 10. Neither the clerk nor any member of the board of county road commissioners shall, directly or indirectly, either personally or as a member of any firm or stockholder in any corporation, be pecuniarily interested as contractor or employee in any contract entered into or work carried on by or for such board, or in property purchased or sold by or for such board: *Provided, however,* that this section shall not be construed to prevent the purchase of land for a road, from a member of the board or the clerk thereof. Said board of commissioners may employ such superintendents, engineers, servants and laborers, and purchase such machines, tools, appliances and materials as shall in their judgment be necessary or convenient for the proper carrying on of their work."

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"SEC. 21. Said board of county road commissioners shall have no power to contract indebtedness for any amount in excess of the moneys credited to such board and actually in the hands of the county treasurer: *Provided,* that the board may incur liability upon contracts, after a tax is voted, to an amount not exceeding three-fourths of the said tax. It is hereby made the duty of the counties to keep in reasonable repair, so that they shall be reasonably safe and convenient for public travel, all county roads, bridges and culverts that are within their jurisdiction and under their care and control and which are open to public travel. The provisions of law respecting the liability of townships, cities, villages and corporations for damages for injuries resulting from a failure in the performance of the same duty respecting roads under their control, shall apply to counties adopting such county road system. In actions arising thereunder, service shall be made upon the chairman of the board of supervisors or the county clerk of the county made defendant therein, which shall be named in the process as the 'county of ———,' and any judgment obtained thereon against such county shall be audited and paid as are other claims against such county."

"SEC. 19. Said board of county road commissioners shall have authority to grade, drain, construct, gravel or macadamize any road under their control, or to place thereon any other form of improvement which in their judgment may be best, and may extend and enlarge such improvements; they shall have authority to construct bridges and culverts on the line of such road, and to repair and maintain the said roads, bridges and culverts; they shall have all the authority in respect to such roads, bridges and culverts which is vested in highway officers in townships. Said board of county road commissioners may maintain in their own name an action for any injury to any county road or to any part of the whole width thereof as laid out and established, or to any of the improvements thereon. All moneys recovered in any such action shall be paid to the county treasurer, and be credited to the county road fund. In all cases involving the expenditure of an amount greater than five hundred dollars for the building, rebuilding

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or repairing of roads or bridges, the board of county road commissioners shall advertise for sealed proposals for such work. The board shall have the right to reject any and all bids, and may do the work by day labor, purchasing the necessary material and employing the labor therefor: *Provided, however,* in case the board shall decide to do the work by day labor, the plans and specifications together with all bids received thereon, and the reason, in writing, for not letting the job by contract, shall be filed in the office of the county clerk.

"SEC. 20. On or before the first day of October of each year, said board of county road commissioners shall determine upon the amount of tax which in their judgment should be raised for such year in said county for the purposes aforesaid, specifying and itemizing the roads and parts of roads upon which such moneys are to be expended, stating the amount asked for each of such roads, and shall cause such determination to be entered upon their records. * * * All moneys raised under the provisions of this act shall be expended by such board of county road commissioners exclusively for the purposes herein mentioned."

There is no express power conferred upon the board to enter upon the business of road building in these or in other sections of the law. There is power (section 19) to reject bids for construction and, after rejecting them, to do the work to which the bids referred by *day labor,* purchasing necessary material, in which case the plans and specifications for the work and all bids received and the reason, in writing, for not letting the job by contract, shall be filed in the office of the county clerk. That the legislative purpose was that roads should be constructed by contract is evidenced, also, by the provisions of section 20. It is required that an estimate be furnished to the supervisors, *specifying and itemizing* the roads and parts of roads upon which such moneys are to be expended, stating the amount asked for each of such roads. This is to be made a matter of record.

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It is true that in section 10 the board is given power to employ superintendents, engineers, and others, and to purchase such machines, tools, appliances, and materials as, in their judgment, may be necessary or convenient *for the proper carrying out of their work.* But this power, it is clear, may be exercised, in whole or in part, when contracts for road building are let, and also when bids have been rejected, and performance of particular work by *day labor* has been entered upon. And, besides, there is a continuing duty imposed upon counties, by the act, to maintain county roads and bridges in a condition reasonably safe for travel.

We are advised by the bill of complaint that the supervisors at their October, 1912, session, after considering the recommendations of the board of county road commissioners, decided upon the amount of taxes to be raised in that year in said county of Branch. We are not told what recommendations were made by the commissioners, and do not know how, if at all, the desire and purpose of the commissioners to expend $22,000 for machinery was laid before the supervisors. We are not told whether any existing roads have been by proper action of the commissioners taken over as county roads (chapter 4, §§ 10, 17, 18) or have been laid out by the commissioners. We do not know whether any proposals for doing any work have been advertised for and rejected, in consequence of which it has been determined to do the work by *day labor.*

Assuming that the commissioners had by proper action arrived at the point of purchasing road machinery, the question whether they might do so without advertising for bids must be, we think, answered in the affirmative. The limitation of power found in section 19 does not in terms extend to contracts for the purchase of machinery. The two provisions are not so connected in the framing of the act as to sup-

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port the implication that proposals or bids must be received before machinery is purchased, and, as has been stated, there is a general, continuing duty imposed, which may in performance require the use of machinery, to maintain roads taken over and laid out as county roads. The only, and we think insufficient, consideration opposed to this conclusion is the one that road machinery is bought for the purpose of building, rebuilding, or repairing roads, and the cost of machinery, indirectly at least, enters into the cost of the roads, and therefore is an expenditure for building roads.

The indebtedness created by the contracts does not exceed the liability permitted by the provisions of section 21. Whatever the intention of the commissioners may have been in executing contracts calling for deferred payments, each contract executed was an appropriation of a part of the fund—the only fund at the disposal of the commissioners. Assuming there was $40,000 in the fund, there remained therein, subject to appropriation, if these contracts are held to be valid, the difference between the aggregate amount of the contracts and the $40,000. The fact that the contracts call for payments to be made in later years creates suspicion that it was intended that only those payments falling due in 1913 should be made out of the fund provided for when the contracts were made. The fact that the deferred payments do not draw interest is indicative of this purpose. The ordinary business man would assume that a price was agreed upon for the machinery which included some consideration for the deferred payments. It is not entirely reasonable to suppose that, being entitled to immediate, or practically immediate, payment for the machinery, out of a fund already provided for and soon to be in existence, the vendors (or the vendees) contemplated that a portion of the fund would be kept on hand for a numbers of years and

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then paid to them; the county, perhaps, having the benefit of such interest as the money would meantime earn. The bill does not charge that the parties to the contracts proposed to evade or disobey the law. It charges, in effect, that the result of what has been done is the contracting of a debt to be paid in the years 1914, 1915, and 1916, out of moneys not actually voted or collected when the indebtedness was created. There is to be considered the presumption of official honesty and obedience to the law. We are not prepared to say that the mere form and terms of the contracts require us to declare them invalid.

We do hold, and concerning this there should be no misapprehension, that the appropriations made by them are appropriations of the fund with respect to which, and with respect to which only, the commissioners had power to incur any indebtedness. To the amount that an indebtedness was created it must be paid out of and, to that extent, it exhausted the fund, and as in this view the contracts may be valid, notwithstanding the provision for deferred payments, we decline to hold them invalid.

The decree below will be affirmed; but neither party will recover costs of this appeal.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and BIRD, JJ., concurred.

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PEOPLE *v.* KOHARSKI.

1. CRIMINAL LAW—TRIAL—OPENING STATEMENT.

The requirement that plaintiff's counsel shall make a full and fair statement of his case and of the facts that he expects to prove (Circuit Court Rule 24), is directory only: in a prosecution for murder, the prosecuting attorney did not commit reversible error in omitting to make an opening statement.

2. HOMICIDE—CONSPIRACY—MURDER—INTENT.

While it is a general rule that the several conspirators engaged in the commission of a felony are chargeable with a murder which one of them commits in the process of carrying out the purposed offense, even though homicide was not planned, the same rule does not apply to conspirators engaged in a misdemeanor which results in unpremeditated homicide.

3. SAME.

The trial court, in a murder case, committed error in charging the jury that "where several persons are concerned in the commission of a felony or of any unlawful act," and in the execution of a common purpose any one of them commits a murder, all who were present aiding or abetting in the unlawful purpose were guilty of the murder, the testimony having tendency to prove that the offense which the accused conspired to commit was simple assault,—a misdemeanor.

Error to the recorder's court of the city of Detroit; Phelan, J. Submitted June 13, 1913. (Docket No. 122.) Decided September 30, 1913.

Philip Koharski brings error from a conviction of the crime of murder. Reversed.

Grant Fellows, Attorney General, *Hugh Shepherd*, Prosecuting Attorney, and *Robert M. Toms*, Assistant Prosecuting Attorney, for the people.

Chawke & Sloan, for respondent.

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BIRD, J. The respondent was informed against jointly with Joe Brostowicki and John Osik, and charged with the murder of Stanley Bartnitzki. He was given a separate trial, and convicted of murder in the second degree, and judgment was pronounced thereon. Both respondent and the deceased lived on Willis avenue near Orleans street in the city of Detroit. On the night of July 3, 1912, the deceased, Stanley Bartnitzki, got into an altercation with Brostowicki and worsted him, after which Brostowicki walked east on Willis avenue, where he met the respondent, Osik, and another young man. Brostowicki's clothing gave evidence of his encounter. He was hatless, and was crying. He informed them what had taken place, and told them that he was going back to kill Bartnitzki. The boys advised him to go home; but he started back towards Bartnitzki's house, followed by the boys. The testimony tends to show that Brostowicki went into the yard first, and was followed by the respondent; some of it, however, is to the effect that the respondent entered the yard first, and began the assault. He admits that he exhibited and flourished an unloaded revolver, saying that he would shoot any one "who did not stop fighting." Brostowicki and Bartnitzki soon became engaged again in a fight, in which Brostowicki stabbed Bartnitzki, as the result of which Bartnitzki died very soon after.

It is claimed on the part of the people that Brostowicki was aided by the respondent in making the assault and in keeping the other members of Bartnitzki's family from assisting him in his fight with Brostowicki. It is claimed upon the part of the respondent that he did nothing except to flourish the revolver and threaten any one who did not stop fighting, and that he did not know Bartnitzki, and that he had no ill will or malice against him, and had no mo-

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tive for helping either him or Brostowicki, as he had neither acquaintance nor connection with either.

The respondent complains of several errors which occurred on the trial, two of which only will be considered.

(1) At the outset of the trial, the prosecuting attorney omitted the opening statement to the jury. This omission was called to the attention of the trial court, and a ruling requested that a statement should be made. The court refused to so rule and his refusal is now assigned as error. There appears to be no statute requiring the prosecuting attorney to make an opening statement to the jury; but there is a court rule which seems to make it his duty, and upon this rule the respondent bases his argument. The rule provides that:

"On the trial of a cause it shall be the duty of the plaintiff's counsel, before offering evidence to support the issue on his part, to make a full and fair statement of his case and of the facts which he expects to prove." Circuit Court Rule 24.

The prosecutor argues that this rule is directory merely, and not mandatory, and cites several authorities in support of his contention. *Johnson* v. *Commonwealth*, 111 Va. 877 (69 S. E. 1104); *Holsey* v. *State*, 24 Tex. App. 35 (5 S. W. 523); *United States* v. *Sprague*, 8 Utah, 378 (31 Pac. 1049).

We are of the opinion that the rule is directory, and that it was promulgated for the purpose of having the plaintiff's case outlined in advance so that the jury could the better see the force and bearing of the evidence as it came in, and, while we think it is a proper rule to enforce, we are not prepared to say that the refusal to enforce it is reversible error, where its omission is not shown to have been prejudicial to respondent's case. It is not pointed out by respondent how his case suffered by reason of its omission, and, in view of the fact that the first witness upon the

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stand, the widow of the deceased, told a connected story of the whole controversy, we think the jury must have been early advised as to what the claims of the prosecution were.

(2) Serious complaint is made of the court's charge, wherein he instructed the jury that:

"There is another rule of law which you should understand in a case of this kind; that is, where several persons are concerned in the commission of a felony, *or of an unlawful act,* and, in the execution of the common purpose, any one of them commits a murder, all who are present aiding or abetting in the unlawful purpose are guilty of the murder, and it is not necessary, in order to make a party liable, that he be actually and immediately present at the commission of the offense. * * *

"I charge you that, before you can find Koharski guilty of murder or manslaughter, you must be satisfied beyond a reasonable doubt from the evidence that he entered into an offer with Brostowicki and Osik, his codefendants, to whip Bartnitzki. Brostowicki is the man who was convicted here the day before yesterday. If that is true, he would be responsible for those acts."

While respondent admits that the law is that, where two or more persons conspire to commit a felony, and murder results, all are equally guilty of murder, it is insisted that, where two or more enter into a common purpose to commit a misdemeanor, and one goes further and beyond the common intent and purpose and commits a felony, his coconspirators are not guilty of the felony. The rule contended for by the respondent appears to have the support of our decisions. The rule finds support in the case of *People* v. *Knapp,* 26 Mich. 112. It was again considered in the case of *Nye* v. *People,* 35 Mich. 16, and later, in the case of *People* v. *Foley,* 59 Mich. 553 (26 N. W. 699), and the last case where the question was under consideration was the case of *People* v. *Bel-*

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ton, 160 Mich. 416 (125 N. W. 386), wherein Mr. Justice STONE said in part:

"Undoubtedly if two persons go out with a common purpose to rob a man—that being a felony—and the man resists, and is killed by one of the conspirators or robbers, while the other robber is aiding and abetting his comrade by watching in aid of the common purpose or conspiracy, both might be guilty of murder, and this because of the conspiracy to commit a felony. But that doctrine would not apply in a case of assault with intent on the part of the assaulter only to rob, where the common purpose was to commit an assault only—a mere misdemeanor."

The record contains evidence which fully justifies the verdict which was reached by the jury, and, had that portion of the charge complained of been omitted, the result might have been the same. But if the jury were of the opinion that the conspiracy of respondent and Brostowicki went no further than a common purpose to whip Bartnitzki, then there was no room for them under the charge of the court to reach a different conclusion, although the respondent was entitled to it. As the proofs would admit of such conclusion, the charge was very damaging to respondent's case, and the cause must be reversed for that reason.

The conviction will be set aside, and a new trial granted, and the respondent remanded to the proper authorities of Wayne county.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and OSTRANDER, JJ., concurred.

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WINGERT v. DETROIT UNITED RAILWAY.

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—STREET RAILWAYS—TRIAL—INSTRUCTIONS TO JURY.

In the absence of any evidence that would tend to show negligence on plaintiff's part in trying to turn off defendant's tracks in advance of a moving car, which struck the end of his vehicle, plaintiff being delayed in his efforts to escape from the tracks by snow and ice banked up on either side, the court committed reversible error by leaving to the jury the question of contributory negligence, in plaintiff's failing to clear the track in time to avoid the collision.[1]

2. STREET RAILWAYS—DUTY TO PERSONS ON TRACK.

The duty of defendant's motorman, when he saw that the driver of a vehicle on the tracks was making an effort to escape, and was impeded by slipping of his wheels on the snow banked at the side, was to delay until the wagon had left the track, and it was the duty of the plaintiff to leave the track with reasonable expedition after he discovered the presence of the car.

3. SAME—REQUESTS TO CHARGE—SNOW AND ICE—REMOVAL.

Plaintiff's requests to charge that defendant corporation was liable if it left piles or ridges along the street so as to create obstructions to free use of the streets, was properly refused by the court.

4. SAME—PERSONAL INJURIES.

Defendant's motorman was, however, bound to operate his car with reference to all circumstances known to him, including the liability of the wheels of a conveyance to slip or slide along the rails and on the obstruction created by the snow.

Error to Wayne; Van Zile, J. Submitted June 16, 1913. (Docket No. 111). Decided September 30, 1913.

[1] As to injuries by street car collisions with vehicles or horses, generally, see note in 25 L. R. A. 508.

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Case by William Wingert against the Detroit United Railway for personal injuries. Judgment for defendant, and plaintiff brings error. Reversed.

Clarence P. Milligan, for appellant.

Corliss, Leete & Joslyn (William G. Fitzpatrick, of counsel), for appellee.

OSTRANDER, J. Plaintiff, with one horse and an empty wagon, on which was a rack for carrying empty barrels, was proceeding westward on Monroe avenue in the city of Detroit. He was driving on defendant's track. He knew there was a street car, going west, approaching, and he attempted to leave the track. Defendant's motorman saw plaintiff driving on the track, saw his efforts to leave the track, and, as the car approached the wagon, reduced the speed of the car so that for some distance it approximated the speed at which plaintiff was moving. However, in trying to pass the wagon, the car struck the rear wheel, jolting, but not much injuring, the vehicle, and plaintiff's foot was in some way caught, and his ankle injured. For this injury he seeks in this suit to recover damages. The jury returned a verdict for defendant, judgment was entered, and a new trial was asked for and refused. The errors assigned are based upon the ruling refusing this motion, upon refusals to charge as requested by plaintiff, and upon portions of the charge which was given. Plaintiff requested the court to charge the jury:

"I charge you that it is the duty of the railway company in this case in removing snow from its tracks to adopt such a mode that will not create obstructions in the streets to the detriment of the public or their danger in the ordinary use of the street. In removing the snow, it cannot be permitted to leave it in ridges or piles and make them unsafe for vehicles to pass along. Its rights in this respect are subject and not paramount to the rights of the public

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to use the streets for the ordinary purpose of passage, and all acts which create obstructions to the free use of the streets by the public are unlawful, and, if such acts result in injury to others, such company is liable in law for such injuries so sustained."

"I charge you that, if the accident was caused by the rear wheels of the wagon slipping on the ridges of snow toward the track and in the path of the car, and you find the defendant company negligently piled these ridges there in clearing their track, and that but for this the accident would not have happened, the defendant would be liable for having created the obstructions in the street which were the proximate cause of the injury, or one of the concurring causes thereof."

If reversible error was committed in the instructions which were given to the jury, it was in a single particular. The issue of fact was stated in the following language:

"Did this man exercise care and diligence, the ordinary care and prudence of an ordinarily careful and prudent man, in driving this car on this occasion and passing this wagon? Was the wagon in a condition off of the track and clear from the track, at the time when the motorman claims it was, and is claimed by the defendant, and was it so clear from the track that, in your judgment, a careful and prudent motorman would have undertaken to pass the wagon?"

And in the following:

"Now, if you find in this case that this was the condition there, and that this motorman exercised care and diligence in the handling that car, and that the car was slowed down in traveling along there just in the rear of this rack, and that the motorman was watching for an opportunity to pass, and if you further find that he attempted to pass when an ordinary careful and diligent man would have determined that there was room to pass, and that he undertook to pass under such circumstances, and the car was struck because, as it is claimed by the defendant,

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it slipped just at the time back onto the track or toward the track, and that the accident could not be avoided by this diligence of the motorman, then, if such is the case, this company is not liable, and your verdict should be for the defendant."

Following the language first above set out, the court also said:

"And did the plaintiff on that occasion do all that an ordinary and careful man would have done to get out of the way of the car? Was the snow in the condition that an ordinary prudent and careful man could have driven that rack off the track and cleared the car?"

Following the other statement, the court proceeded to say:

"On the other hand, should you find that the motorman did not exercise this care and diligence, but that the plaintiff was guilty of negligence in this, that he could, by the use of diligence, have cleared this track far enough to allow the car to pass, having time to do so, and having warning of the approach of the car, * * * then the company is not liable, and your verdict will be for the defendant, because he would be guilty of contributory negligence."

The collision occurred February 7, 1911, in the forenoon. On February 6, 1911, it had snowed all day until 5 o'clock in the afternoon; the fall being more than 12 inches. The maximum temperature February 7th was 24 degrees, the minimum 16 degrees, with three hours of sunshine. Witnesses do not agree concerning all details; but it is undisputed that defendant's snowplow had thrown the snow from the track towards the sides of the street—the curb—and that more or less of a ridge of snow and ice was created between the track and the curb. From the nose of the horse to the end of the wagon plaintiff was driving was about 29 feet, and the distance from the north rail of defendant's track to the curb was about 13 feet. Plaintiff could not leave the

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track by driving directly north at right angles to the rails. The line upon which he did leave it made with the rail an acute angle. There is no testimony tending to prove that upon discovering the approach of the car plaintiff did not immediately proceed to leave the track, and none tending to prove that for this purpose he drove carelessly or imprudently. It does not appear that he remitted or relaxed his efforts, which were visible to the motorman of the car. No one testified that he drove off the tracks and then on again. Referring to the testimony of the motorman, it was, in part, as follows:

"*Q.* What was he doing as you observed—how was he trying to get out—as you observed that, what did you do?

"*A.* He was getting out of the way in a kittering direction, and it seemed that he couldn't get out fast because it was slippery; there was ice and snow on the street; the snow was piled up high where the snowplow went through it the day before.

"*Q.* Was there any time before the accident happened that the wagon or rack got off the track, so you could get in the clear?

"*A.* Yes.

"*Q.* What did you do then?

"*A.* I don't understand that.

"*Q.* Was there ever a period of time when you were approaching after the wagon that it was out of the way of the car, so you could go by, as you supposed?

"*A.* Yes, it seemed to slip back.

"*Q.* When did it slip back, with reference to the time that you saw the accident happen; where was your car when it started to slip back?

"*A.* Oh, it was pretty close after the wagon.

"*Q.* From the time it started or seemed to slip back, did you do anything to stop that car?

"*A.* I put on the brakes as soon as I could, and had the power cut off long before that. It was the corner of the car struck the corner or end of the barrel wagon. It broke the side window of the vestibule, right under the window. The car went about three

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feet after the accident. There was no injury to the wagon that I noticed.

"Cross-examination: When I turned onto Monroe ayenue, going west, I saw the man driving his wagon between the rails about 200 feet ahead of me. I rang the bell right after I left Elmwood. When he started to pull off the tracks, I was about 50 feet away from him, going as fast as a man can walk. I could have stopped the car in a car's length, if the rails had not been all slippery. I knew that I could not stop as quick with a wet rail; but I did not know it was slippery there. I knew that he could not get off the track as quick with the snow shoveled up beside the street car by the company. I expected that he could drive away before I got to him. That is what I would have figured on at the time.

"*Q.* You knew that the snow being deep and shoveled up there off the track by the street car company, that it would cause him more delay in getting his horse through the snow and the wheels, than if there was no snow there?

"*A.* No, sir; I did not know that. It was the first winter I was street carring, and I did not understand. I was on time that morning, and I was using a double-truck car. The street is narrow, and the car tracks are in the center. It is 12 or 13 feet from the car tracks to the curbstone. I do not know how high the snow was piled up there along the track.

"*Q.* He was doing all he could, was he not, to get off of the track when you struck him?

"*A.* Yes, when I struck him. I did all I could to stop the car before it hit the wagon.

"Examination by the Court: I was not going very fast when I struck him. The wagon was going about as fast as I can walk, and we were both going at about the same speed.

"*Q.* How long did that continue, that creeping and drifting along right together, how long did you go along with the wagon, about the same speed as the car, about how much distance?

"*A.* I can't tell.

"*The Court:* Measure it by objects here in the room.

"*A.* From here to the back end of the room.

"*Q.* From you to the back end of the room?

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"*A.* Yes.
"*Q.* Did you go right along with the wagon?
"*A.* Yes.
"*Q.* Do you think as far as that?
"*A.* Yes, but I can't remember.
"*Q.* Just as you remember it?
"*A.* It was like that, more or less.
"*Q.* Something like that?
"*A.* Yes, sir."

No one pretends that plaintiff was a trespasser in driving on or between the rails of defendant's track. We assume that no one will contend that it was the right of defendant to push him off the track either before or after he attempted to leave it. Under the circumstances, the relative duties of the plaintiff and the motorman were plain. It was plaintiff's duty to leave the track with reasonable expedition, and it was defendant's duty—the motorman's duty—seeing the effort plaintiff was making, the car with its passengers and the wagon with plaintiff being in no danger, to delay until the wagon had left the track. See *Manor* v. *Railway Co.*, 118 Mich. 1 (76 N. W. 139); *Rouse* v. *Railway*, 128 Mich. 149 (87 N. W. 68); *Hibbler* v. *Railway*, 172 Mich. 368 (137 N. W. 719).

There is no testimony tending to prove that plaintiff did not perform his duty. In determining whether the motorman performed his duty, there was involved no question of plaintiff's negligence. It is obvious, however, that the jury may have concluded that plaintiff "could have driven that rack off the track and cleared the car"—"that he could, by the use of diligence, have cleared this track far enough to allow the car to pass, having time to do so and having warning of the approach of the car," and, having so concluded, returned a verdict for defendant, under the instructions. In the respect indicated, the instructions were erroneous and probably prejudicial to plaintiff.

As the case must go down for a new trial, we notice

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the assignments of error based upon the refusal of the court to give requested instructions. The refusal of the court to give these instructions was not error. The case is wholly different from *Bowen* v. *Railway Co.*, 54 Mich. 496 (20 N. W. 559, 52 Am. Rep. 822), *Wallace* v. *Railway Co.*, 58 Mich. 231 (24 N. W. 870), *Laughlin* v. *Railway Co.*, 62 Mich. 220 (28 N. W. 873), which are cited by plaintiff. It is immaterial, in view of the admitted facts in this case, who was responsible for the condition of the street. The street, outside of the tracks, was not impassable. Plaintiff drove upon the tracks for his own convenience, knowing that he must leave them whenever a car approached him. It is not claimed that, having left the track, there was not abundant room to drive in safety alongside the tracks.

The obstruction caused by the snow and ice hindered him, in some degree, in getting off the tracks —it delayed him. The motorman knew this, and was bound to operate the car with reference to all the circumstances, including the condition of the street, which appeared to affect, or to be liable to affect, the matter of a safe passage. One circumstance was that, because of the condition of the street, the rear wheels of the empty wagon might slip and slide along the rails and on the side of the obstruction in the street after the horse and the front wheels had cleared the tracks.

The judgment is reversed, and a new trial granted.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and BIRD, JJ., concurred.

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STITT *v.* LOCOMOTIVE ENGINEERS' MUTUAL PROTECTIVE ASSOCIATION.

1. INSURANCE — INDEMNITY POLICY — MUTUAL BENEFIT ASSOCIATIONS.

Under a policy of indemnity against loss of employment occasioned by discharge of the insured or his suspension as a penalty or method of discipline, containing a condition that knowingly disobeying orders or rules should not be included among the insurable causes of discharge, and that the insured must show by his notice of claim and accompanying proofs that his suspension or discharge was strictly within the terms of the certificate or policy, and that the cause assigned by the employer should be the sole basis of determining liability, such assigned cause must be taken as a basis or general reason for the discharge, and could not be contradicted, but it would be an unreasonable construction to hold that plaintiff could not recover unless his employer stated as cause of his discharge all the stipulated conditions or provisions essential to liability.[1]

2. SAME.

Both application and policy must be construed together as constituting the contract, and plaintiff is presumed to have read and understood both.

3. SAME—DISCHARGE—MASTER AND SERVANT.

And under its conditions plaintiff could only recover if his discharge or suspension was in the nature of a penalty, the word discharge presumptively meaning that the employer no longer needs or desires the servant's services and terminates the contract relation.

4. SAME—CONTRACTS—CONSTRUCTION—PENALTY.

Penalty indicates punishment for doing or failing to do a required act.

5. SAME—DISCIPLINE.

But the word discipline as employed in the contract signified instruction, or the communication of knowledge and

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training to observe and act in accordance with rules or orders and was used in the sense of correction, chastisement, or punishment inflicted by way of training.

6. SAME—CONDITIONS PRECEDENT—NOTICE TO INSURER.

Where plaintiff's notice of claim given to the insurer did not indicate that his suspension or discharge was a penalty or measure of discipline, and not for knowingly disobeying orders or rules, and the policy required specifically that his statement must show that he was within the provisions of the certificate, he could not recover, and a verdict was properly directed for defendant.

Error to Bay; Collins, J. Submitted June 19, 1913. (Docket No. 56.) Decided September 30, 1913.

Assumpsit by Raleigh K. Stitt against the Locomotive Engineers' Mutual Protective Association under an indemnity policy. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Hall & De Foe, for appellant.

Cavanaugh, Wedemeyer & Burke, for appellee.

STEERE, C. J. Plaintiff brought this action in the circuit court of Bay county to recover an indemnity of $15 per week, during 33 1/3 weeks, for loss of time by being out of employment, under an indemnity policy issued to him by defendant. The case was tried December 16, 1912, before a jury. The testimony was mostly documentary; plaintiff being the only witness sworn. The trial resulted in a judgment for defendant on a directed verdict, and, after denial of a motion for a new trial, plaintiff removed the proceedings to this court for review upon a writ of error.

When insured, plaintiff was a locomotive engineer running freight engines hauling freight trains in the employ of the Grand Trunk Railway system. He

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joined the defendant association in July, 1911, was suspended from his employment for violation of orders September 1, 1911, and was never reinstated, being discharged 18 days later for the same reason. On April 26, 1912, he began this action.

On July 12, 1911, plaintiff made written application for membership in the defendant association, which application was in part as follows:

"I further agree that in case my application is accepted, and I at any time thereafter become a claimant, to furnish said association with full and complete proofs of my claim, furnishing the statement of any reliable witnesses or persons who may have knowledge of the matter, and that the cause assigned by my employer for suspension or discharge shall be the sole basis of determining the liability of the association."

The next day the defendant issued to him a certificate of membership, insuring him—

"Against loss of time by being out of employment, occasioned by his discharge or suspension as a penalty or method of discipline, from his present position as a locomotive engineer, subject to the conditions as hereinafter stated."

The indemnity was limited to $500, being $15 per week for not to exceed 33 1/3 weeks. Said certificate of membership also provided:

"Notice of every claim must be signed by the applicant and must set forth the reasons for which he is under suspension or discharge, and must show by his own statement and the statements of at least two other persons who are acquainted with the facts in the case that such suspension or discharge is within the provisions of this certificate and that he is clearly entitled to the indemnity applied for. * * * Time is strictly the essence of this provision and unless notice is mailed to the home office of the association in the manner and within the time specified, no

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rights shall accrue to the member and no claim shall be made nor indemnity paid under this certificate.

"This certificate does not include nor cover any suspension or discharge not in the nature of a penalty or measure of discipline nor any case arising or traceable to any of the following causes or conditions, viz.: * * * knowingly disobeying orders or rules.

"The member shall, as a condition precedent to the establishment of his claim, furnish under oath such reasonable proofs in addition to his notice of loss as may be demanded of him by the association, and failure or refusal to furnish such proofs within ten days after same are demanded of him in writing, shall estop and prevent him from asserting any rights as a claimant under this certificate."

The acts for which plaintiff was suspended and subsequently discharged were committed August 21, 1911, and the cause assigned by the railroad company in discharging him is stated in his notice of claim for indemnity to have been "for exceeding speed limit of eight miles per hour over Raisin River bridge and for using interlocking plant at Slocum, Mich., with signals set against me."

His notice of claim was returned with a request for further information, and he added the following:

"In regard to attached request for further information, I would say there was a bulletin in bulletin book at Lang terminal restricting the speed of trains to eight miles per hour over Raisin River bridge at Monroe, but that there had never been any special orders issued to this effect. And, farther, that the superintendent of the line of which this bridge is a part reported my speed over this bridge at a rate much exceeding the speed used in crossing same.

"Farther, in using hand signal at home semaphore at Slocum, I did this strictly according to the interlocking rules, which allow an engineman to use hand signals, from the towerman, providing the towerman is on the ground when giving the signal (and the signal is meant for the train using the same, without a doubt), in which case the train must approach the

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signal under full control and know that derails are properly set. All these instructions were carried out, and the signal I acted on could have been for no other train, as there was no other train approaching crossing in either direction."

His two witnesses, the conductor and fireman, gave, respectively, the "details" of the acts on which his discharge was based as—

"Exceeded speed limit over Raisin River bridge at Monroe, and used hand signal in crossing Michigan Central interlocked crossing instead of receiving and using semaphore. * * * Exceeded speed limit over Raisin River bridge, and used hand signal instead of semaphore at Michigan Central interlocked crossing."

Plaintiff paid all dues and assessments called for by defendant, and was a member in good standing at the time he was suspended, on September 1, 1911. He testified that he had been an engineer on the Grand Trunk Railway for four years; that, as was his duty, he had familiarized himself with the rules and bulletins of the company; that he was familiar with the bulletin order in relation to rate of speed for trains crossing the Raisin River bridge, exceeding which was one of the reasons assigned by the company for his suspension and discharge; that neither the railway company nor any of its officials ever assigned as a reason for his suspension or discharge that he *knowingly* violated any rule of the company. The following question asked him by his counsel was objected to, and the objection sustained: "*Q.* State the circumstances under which you ran over that bridge?"

It was conceded by both parties that no issue of fact for the jury was involved, and each asked a directed verdict.

Plaintiff's counsel contended at the time of the trial that, inasmuch as the policy provided distinctly that

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the reason assigned by the company upon his discharge as to the cause of discharge shall be the sole measure of determining his liability, and, it not being stated that he was suspended or discharged for *knowingly* doing the acts stated as a reason for his discharge, a verdict should be directed in his favor, for the reason that this certificate, or policy, stated, as a condition, that it did not include nor cover any suspension "not in the nature of a penalty or measure of discipline, nor * * * *knowingly* disobeying orders or rules."

In construing the policy before directing a verdict for defendant, the court said, addressing counsel for plaintiff:

"It is your contention, and it is the contention of the defendant, that the cause assigned by the railroad company is the cause. The cause assigned by the railroad company, as described by the plaintiff, and as described by these witnesses, assigned as cause of an act, the doing of which act was knowingly done, the doing of the act implies that it was knowingly done."

Plaintiff promptly made a motion for a new trial, again urging that a proper construction of the policy entitled him to a directed verdict in his favor, and further contending that, if such view did not prevail, he was entitled to have submitted to the jury as an issue of fact the question of whether or not he knowingly disobeyed any rules or orders of his employer. Upon this proposition the contention of his counsel is stated in said written motion for a new trial as follows:

"On the trial of the issue it was mistakenly assumed by both counsel for plaintiff and counsel for defendant, and such issue was submitted to the court on the theory that the provision in the application that the cause assigned for suspension or discharge should be the sole basis for determining the liability of the defendant means that the employer should by

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the cause assigned determine the liability as between plaintiff and defendant, without leaving the issue as to whether the plaintiff in disobeying the orders and rules did so knowingly, while in fact the true construction of such provision in said application is that the cause assigned by the employer for suspension or discharge merely refers to the reason for such suspension or discharge, and precludes either plaintiff or defendant from assigning any other reason therefor, leaving the question as to whether the disobedience of orders or rules which led to the suspension or discharge was a knowing disobedience on the part of plaintiff to be determined as an issue of fact in the case, for which reason the question of whether such disobedience by the plaintiff was in fact knowing should have been submitted to the jury as a question of fact."

In its reasons for denying such motion, the trial court, among other things, stated:

"The proofs of loss or proofs of claim filed by the defendant show that he knowingly violated a rule of his employer in exceeding the speed limit over the Raisin River bridge at Monroe, Mich., and for accepting a hand signal, crossing interlocker plant with semaphore set against him.

"Under the policy sued on in this case, when it appears that the insured is employed by a railroad company, and that he is discharged, and that the effect of the order discharging him is a finding on the part of his employer that the insured was discharged for knowingly disobeying an order or rule of the company, as between the insurance company and the insured the finding of the railroad company is conclusive and binding, and cannot be disputed by the insured. That is a part of his contract of insurance."

We do not think a fair and reasonable interpretation of the contract limits the inquiry to the cause assigned by the employer, as contended by defendant, by reason of the provision that it should be "the sole basis of determining the liability of the association." It must be taken as the basis, as the general

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reason of discharge, and cannot be contradicted; but the employer is not a party to the contract of indemnity, nor presumably interested in it; and it would be an unreasonable construction to hold that plaintiff cannot recover unless the employer states, and assigns as cause, all the numerous provisions, exceptions, and conditions in detail essential to a recovery with which defendant has freighted its policy. But it is incumbent upon plaintiff, under his contract, in harmony with the cause assigned by the employer, and with it as the sole basis, to set out in his notice of claim, aver, and establish in his proofs that which by his contract is essential to a recovery.

The contract must govern, though it may be more harsh and unfavorable to plaintiff than defendant. Courts do not make contracts for parties; they can only construe and administer them.

Defendant is of that class of mutual indemnity or insurance companies organized, apparently without capital, on the assessment plan to secure to its members a continuance of wages, when out of employment, for a certain length of time, under specified conditions. Those conditions seem to be conspicuously numerous and stringent in this instance; but a member of such an association is at the same time an insurer and an insured. In contemplation of law he is a party to imposing the conditions and restrictions in the policy issued to members.

When he accepts such policy, his rights as an insured are determined by its terms, whatever they may be. His application and certificate of membership, or policy, must be taken and construed together as constituting the contract between the parties. He is presumed to have read his application and been fully acquainted with its contents. *Briggs* v. *Insurance Co.*, 65 Mich. 52 (31 N. W. 616). Plaintiff makes no claim in this case that he was not, and in answer to numerous questions in his application cer-

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tifies, over his signature, that he understands its provisions.

While all insurance, strictly considered, is for indemnity, this is of that special kind more conspicuously so, and is often called "indemnity insurance," as distinguished from fire, marine, life, and other more common forms of insurance. A careful study of the contract leads to the conviction that it is not favorable to the insured, and his rights under it are limited. The fact that he has been suspended or discharged, standing alone, gives him no rights. It is only when his suspension or discharge is in the nature of a penalty or measure of discipline, that he may urge his claim at all. This would seem to cast particular difficulties in his way in case of discharge.

A discharge presumptively means that the employer no longer needs or desires his services; that he is done with him, and all contract relations are at an end. In such case it is difficult to see why the employer should dispense with his services as a penalty, or to discipline him.

In a popular sense it can be said all persons discharged from a satisfactory and profitable employment are penalized and disciplined in the particular that penalty and discipline are punishment; but a penalty in legal significance indicates a punishment inflicted by a law for its violation, including both fine and forfeiture, or imposed by contract for doing or failing to do something in violation of the contract obligations.

While "discipline" has no technical, legal meaning, it in common and most general use signifies "instruction, comprehending the communication of knowledge and training to observe and act in accordance with rules or orders," or, as it may be inferred was the meaning intended here, "correction, chastisement, or punishment inflicted by way of training." By the terms of the policy this must be an element

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before recovery can be had, and there is no statement in the cause of suspension or discharge assigned by the railway company, nor in plaintiff's notice of claim and the accompanying statements of his two witnesses, that his employment was terminated as a penalty or measure of discipline.

Even though such was the cause, and it was properly set out in his notice of claim, he would yet have no right to indemnity, if the cause arose from, or was traceable to—

"Absence from engine while in charge of same; nor for any act or acts while in charge of your engine, use of intoxicating liquors, soliciting his own discharge or suspension, striking, garnishment, fighting, assaulting superior officers, knowingly disobeying orders or rules," etc.

No mention is made of these matters in his notice of claim, nor in the cause assigned by his employer.

Plaintiff's contract specifically and distinctly requires that his notice of claim, corresponding to proofs of loss in ordinary insurance—

"Must show by his own statement and the statements of at least two other persons who are acquainted with the facts in the case that such suspension or discharge is within the provisions of this certificate and that he is clearly entitled to the indemnity applied for."

Both plaintiff's statement and those of his two witnesess fail in numerous particulars, beside the allegation that he did not knowingly disobey orders or rules, to show that his suspension and discharge are within the provisions of his contract, though he was requested, and given further time, to submit additional, full, "final, and complete proofs."

The contract under which he brings suit makes it obligatory upon him to establish those things requisite to show himself entitled to indemnity, in order to make out a *prima facie* case. In this he

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failed, and we are constrained to conclude that the trial court correctly determined "that the plaintiff has not, as a matter of law, shown a case against defendant."

The judgment is affirmed.

MOORE, MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

CUMMINS v. BOYNE CITY TANNING CO.

1. MASTER AND SERVANT — PERSONAL INJURIES — NEGLIGENCE — RISKS ASSUMED—DEFECTIVE BELT.

Whether defendant's servant, who was injured in oiling or adjusting a fan operated by a defective belt which caught his hand or wrist and forced it into the fan, knew of the defect alleged or not, was, under conflicting testimony, properly left to the jury to determine.

2. SAME—EVIDENCE OF NEGLIGENCE—DEFECTS IN MACHINERY.

Plaintiff's testimony that defendant was using a canvas belt temporarily to operate the fan, and that the edge of the belt, being frayed, struck his hand so as to force it into the revolving fan, supported the verdict rendered in his favor.

3. NEW TRIAL — AFFIDAVIT — SUFFICIENCY OF SHOWING — DILIGENCE.

On defendant's motion for a new trial the court rightly refused to set aside the verdict on the affidavit of the president and treasurer of defendant corporation that he expected to be able to show by a witness that plaintiff had given a different account of the manner in which he was injured, tending to relieve defendant of liability;

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that he learned of the testimony after the trial and had not had sufficient time to procure an affidavit from the witness, whose sworn statement was not presented to the court nearly five months afterwards when the motion was argued.

Error to Charlevoix; Mayne, J. Submitted June 18, 1913. (Docket No. 54.) Decided September 30, 1913.

Case by Carl Cummins against the Boyne City Tanning Company for personal injuries. Judgment for plaintiff, and defendant brings error. Affirmed.

J. E. Converse (A. G. Urquhart, of counsel), for appellant.

Hall, De Foe & Hall, for appellee.

Plaintiff was employed as night fireman in the lower stokehole or fireroom of defendant's establishment. His duties were to take care of the fires and to oil the bearing of a fan which performed the office of taking foul air from the room. The fan was set in the cement wall of the room, was some 34 inches in diameter, and was operated by an electric motor. The motor and an attached pulley were in the stokehole, but the switch controlling the current of electricity was on the floor above, where there were other fire holes attended by other men. From the motor pulley to the fan pulley, a distance of 7 or 8 feet, a belt was used. Three braces described an arc from the wall and the casing of the fan and united to form the bearing of the fan axle; outside of these braces was the fan pulley, between which and the braces there was an oil or grease cup. Inside the braces and the bearing was another grease cup. Hard oil was used in the cups, and it was plaintiff's duty to keep the caps of these cups screwed down and, as required, to remove them and fill the cups with grease.

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Plaintiff was unscrewing the cap of the cup next to the pulley, outside of the braces which in part covered the fan, when in some manner his right hand was placed or forced into the fan; the consequences being the loss of the hand. He says his wrist was struck by the belt, the top of which was moving rapidly towards him, and his hand was by the blow forced into the fan. There are flanges on the fan pulley to guide and keep the belt in place, and from the testimony it seems wholly improbable that a smooth and sound belt could have struck his hand or wrist while he was properly unscrewing the oil cup. It is claimed, however, and the testimony tends to prove, that the belt was one temporarily in use in place of a leather belt which had been some time before injured or destroyed; that it was a canvas belt, made up of several pieces laced together; that one edge of the belt was badly frayed and was raveling; that it was made of three plies or layers of canvas, the faces of which were glued together; and that the threads of the upper face or layer were broken and made flaps, which, as the belt went over the pulley, would probably be thrown out and away from the face of the belt. In his declaration plaintiff counted upon a statute duty of defendant to guard the belt, but the court declined to submit the case upon this theory of the defendant's negligence and did submit the question of the negligence of defendant, also counted upon, in using the defective belt. Defendant offered no testimony and, when plaintiff rested, moved the court for a peremptory instruction upon the grounds:

(1) That no negligence of defendant had been proven; (2) contributory negligence of plaintiff had been shown; (3) there was a safe way to oil the bearing (by stopping the motor) and plaintiff assumed the risks of the method he followed.

There was a verdict and judgment for the plain-

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tiff, and a motion for a new trial was denied. One ground of the motion was newly discovered evidence for defendant, and one was that the verdict was against the weight of evidence. It is not contended, however, that the verdict is excessive if plaintiff is entitled to recover.

OSTRANDER, J. *(after stating the facts)*. There are 15 assignments of error, some of which are substantially repeated in the brief for appellant, but otherwise none of them is specifically referred to therein. The brief for appellant does not comply with the rule of this court to which we have so many times called the attention of counsel, and in consequence we have had difficulty in applying the argument to the errors assigned. A reading of the record and briefs has not convinced us that reversible error was committed; mooted questions appearing to be answered by the record and by well-settled principles of law. That the belt in question was defective is not disputed.

Whether its condition was known to plaintiff so that he was cognizant of the danger resulting from its use in case he performed his duty of oiling the fan as he did was a question for the jury. That he performed, or attempted to perform, the duty of oiling the fan as he had always done, and as his superiors had always done, and as he had been instructed to do, is undisputed.

Excluding the idea that he had knowledge of the danger from the defective belt, and, in consequence, excluding the idea that he assumed the risk created by the use of the belt, the positive testimony that his wrist was hit by a portion of it, driving his hand into the fan, if it was believed, supports the verdict. We need not refer to the charge of the court because no portion of it is criticised in the brief. The verdict is not so clearly against the weight of evidence that we can disturb it on that account.

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With the motion for a new trial defendant filed the affidavit of W. S. Shaw, president and treasurer of defendant, to the effect that upon a new trial he expected to be able to prove by one John Bilby, of Fremont, Mich., that five days after the day of the injury plaintiff told Bilby that he was injured in attempting to turn down the oil cup located on the inside of the braces which covered the fan; that this testimony was discovered after the trial, and that he could not present the affidavit of Bilby with the motion for the reason that he was not acquainted with the fact until the time had nearly elapsed for moving for a new trial; that he was prepared to file the said affidavit "during the pendency of this motion." The affidavit of Shaw was made April 30, 1912. The motion for a new trial was heard September 24, 1912, and was denied November 9, 1912. No affidavit of Bilby appears in the record, and we assume that no such affidavit was before the trial court. It does not appear that Bilby told Shaw that he would give the testimony indicated or that Shaw learned from Bilby the fact set out in the affidavit. Aside from other considerations, the showing lacks certainty and was for this reason insufficient to move the court to grant a new trial.

The judgment is affirmed.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and BIRD, JJ., concurred.

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BELLAIRE *v.* WORCESTER LUMBER CO.

1. LOGS AND LOGGING — CONTRIBUTORY NEGLIGENCE — FLOODING LANDS—WATERS AND WATERCOURSES.

   In an action brought by plaintiff for causing his lands to be flooded by a jam formed by defendant's logs that obstructed the river, plaintiff was not chargeable with contributory negligence for permitting a birch tree to remain in a leaning position over the stream so as to obstruct defendant's drive.[1]

2. SAME—RIVERS—NAVIGATION—NEGLIGENCE.

   That defendant suffered a jam to form of logs which its employees were driving down a stream, filling the banks for a considerable distance up the stream past plaintiff's property, that none of defendant's men were within five miles when the conditions arose, and from one and a half to two and a half days elapsed before the men arrived to break the jam which caused plaintiff's land to be flooded and washed out, furnished evidence of negligence.

3. SAME—RIPARIAN RIGHTS—DRIVING LOGS.

   No liability would arise from a jam produced by natural causes, unless, by the exercise of due care, the formation of the jam could have been avoided, but the law requires persons so engaged in driving logs to use due diligence and to employ such number of men and means as will accomplish the object of breaking any jam that may form, without undue delay.

4. SAME—DAMAGES—WEIGHT OF EVIDENCE.

   But a judgment for $1,057 was excessive, on testimony tending to show that the total value of the land damaged was $275, that the cost of diking the river amounted to $550 and other damages did not exceed $20 in all.

5. SAME—REAL PROPERTY—MEASURE OF DAMAGES.

   The measure of damages would be the diminution in value of plaintiff's farm through the effects of defendant's negligence.

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[1] On the question of liability for injuries to riparian owner by running logs in stream, see notes in 41 L. R. A. 494; 64 L. R. A. 983, 986, and 35 L. R. A. (N. S.) 824.

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Error to Houghton; Streeter, J. Submitted June 20, 1913. (Docket No. 67.) Decided September 30, 1913.

Case by Joseph Bellaire against the Worcester Lumber Company for damages to plaintiff's lands. Judgment for plaintiff. Defendant brings error. Reversed.

Allen F. Rees, for appellant.

O'Brien & Le Gendre (George O. Driscoll, of counsel), for appellee.

STEERE, C. J. Plaintiff recovered from defendant a verdict and judgment in the circuit court of Houghton county in the sum of $1,057 for damages claimed to have been done his land by defendant while driving logs down Sturgeon river in the spring of 1908.

The Sturgeon river is a well-known logging stream of the upper peninsula of Michigan; large quantities of forest products having been cut on its shores and tributaries, and driven down it each spring in the time of high water for many years. It is admittedly a navigable stream for such purposes.

Plaintiff is a farmer, owning and occupying a farm of 80 acres bordering on said river near its mouth in a section of low, fertile land known as "Sturgeon river flats." The action of the river through these flats has caused its banks to be slightly higher than most of the adjacent lands, which lie but little above the surface of the water at its normal stage, and during the spring freshets the flats are often overflowed.

Defendant is a lumbering company, operating a sawmill at Chassel, near the mouth of the river, and at the time in question had been lumbering its timber lands upon said stream and its tributaries for several years, floating the logs down it to its mill.

In the spring of 1908 defendant drove its logs, which were cut at various points up the river, down

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to the mill as usual. On April 20th, shortly after the drive started, a log jam formed in the river nearly a mile, by the winding channel, below plaintiff's house, and on, or just below, his land at a point where a large birch tree grew leaning over the water, damming the stream so as to cause the river above to rise and overflow his property, spreading logs and sand over a portion of it, cutting the banks and washing a new channel across a sharp bend of the winding stream.

Defendant's negligence and the resulting injury are stated in plaintiff's declaration to consist of wrongfully and negligently permitting the logs defendant was driving to accumulate, obstruct, and dam up said river on plaintiff's land, and neglecting to properly direct, drive, and float said logs so as to keep them clear of the land, whereby said river became greatly dammed up; and that defendant did also wrongfully and negligently fail to furnish a sufficient number of men to drive the logs without jamming, as a consequence of which neglect, plaintiff's land was overflowed, logs, sand, and other *debris* deposited thereon, the soil washed out and gullied, and a new channel cut, rendering it necessary to build breakwaters to protect the banks and a bridge to reach a portion of the land cut off by the new channel.

At the conclusion of plaintiff's testimony, and again at the conclusion of all the evidence, defendant's counsel moved for a directed verdict in its favor, for the reason there was no evidence of negligence on the part of defendant, and, if there was any evidence of the jam damaging the premises in question, plaintiff was guilty of contributory negligence; again, after verdict and judgment, moving for a new trial, because the verdict was against the great weight of evidence, was excessive, and contrary to the instructions of the court. These motions were

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denied, and defendant has brought the case here for review on a writ of error.

The contributory negligence imputed to plaintiff is his permitting the birch tree, which leaned over the river where the jam formed, to remain there, as a menace and, as it proved, an obstruction to the drive. Had it been shown plaintiff was guilty of some affirmative act in that connection, this contention might require more serious consideration. Defendant's own testimony disclosed that along the river there were a great many leaning cedar, birch, and other trees, and that for trees upon the declining shores to tip or lean over the water was "a common occurrence along the river bank." This birch was growing on the shore of the stream in its natural state, undisturbed except by the operations of nature. It is not shown that plaintiff ever disturbed it in any manner, or, though it leaned low over the water, that it ever interfered with the natural flow of the river. The trouble came from defendant's use of the river for purposes of navigation in driving its logs upon it. No obligation rests upon a riparian owner to clear or deepen a stream flowing past or through his land to make it navigable for any purpose. Defendant's rights upon this river, through plaintiff's land, were its use for such navigation as it was naturally adapted to, which was the floating of logs. For that use it was, in its nature, a highway. Defendant had the right to so use it in the customary and ordinarily prudent manner. When thus using it, defendant was not liable for any damages resulting to adjacent lands by reason of its proper and prudent exercise of such right. For any abuse or negligent misuse of such right resulting in injury to the shore owner, it would be liable. These principles are too well established in this State to require discussion or citation of authority.

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We are unable to accept defendant's contention that there was no evidence of negligence on its part to be submitted to a jury. It is undisputed that, while defendant was driving its logs down the river, a jam formed on or just below plaintiff's land, filling the banks several logs deep at the jam, and extending upstream through plaintiff's property for some distance, variously stated by different witnesses at from 600 or 700 feet to a quarter or a third of a mile; that none of defendant's men was within 5 miles of the jam when it occurred, nor did any reach there until at least 2 nights and a day later, as stated by defendant's foreman, and 2½ days, as stated by a witness of plaintiff, who saw the jam form, and assisted his father in an unsuccessful attempt to break it, after which the father sent word to defendant, being solicitous about the matter because he owned and resided upon land further down the river.

It is well settled that parties engaged in driving logs upon a river naturally navigable for such purpose are not liable for damages caused by jams formed by natural causes, unless, by the exercise of due care, the formation of such jams could have been avoided; but it is "their duty to exercise due diligence in running the logs, and in breaking such jams as are formed by natural causes," and—

"They would be liable for such damage as may be caused from unnecessary or unreasonable delay in removing them. They are required to use due diligence, and to employ such number of men and means as will accomplish the purpose of breaking such jams within a reasonable time, having in view all the circumstances." *Bauman* v. *Boom Co.*, 66 Mich. 544 (33 N. W. 538).

Plaintiff's testimony tended to show that in driving this river it was necessary and customary to keep men along with the logs to "pike them along;" that this jam formed at the head of the drive shortly after

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the logs began to run at that point; that there were no men coming along with that end of the drive, nor within over five miles of it, and that none of defendant's men reached there until 2½ days later, and then only after notice of the jam was sent to defendant by outside parties; that after the jam formed logs were continually sent down against it from upstream, so that, as it increased, the river was jammed with logs to its bottom for some distance above, through plaintiff's land, setting back the water, and causing it to cut through the banks, flooding plaintiff's fields, cutting a new channel across a bend before relief came.

With such testimony in the case, defendant's negligence was a question for the jury. In *Anderson* v. *Boom Co.*, 61 Mich. 489 (28 N. W. 518), involving the flooding of lands by a jam of logs which defendant was driving, it is said:

"It was for the defendant to show the actual condition of the logs and of the water, and to state what was done to move the logs and prevent the overflow, and then it was for the jury to determine whether or not there were unnecessary jams causing the flowage and damage."

See, also, *Hopkins* v. *Commercial Co.*, 16 Mont. 356 (40 Pac. 865).

While we conclude that there was evidence to go to the jury on the questions of its negligence and resulting damage, a careful examination of the record impels to the view that defendant's contention, presented in its motion for a new trial, that the verdict was contrary to the instructions of the court, and, in part at least, against the weight of evidence and excessive, is well founded.

The jam of logs occurred on April 20th, at a time when there were no growing crops upon the land. The flooding of Sturgeon river flats by spring freshets is an annual occurrence. The land is said to

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be enriched from the silt distributed over it during these floods, which are accounted a general benefit; the soil of the flats being known as a silt loam. Plaintiff claims, however, that the flood from the jam was more sudden and severe than the natural ones; that it cut through the retaining banks, instead of quietly flowing over them, and carried quantities of sharp sand, instead of floating silt, upon his fields, leaving a coarse and sterile deposit of sand in the lower places, through which vegetation would not grow, smothering the meadows, and destroying the fertility of the soil; that it cut a new channel across a bend of the river, and shut off access, without a bridge, to land within the former bend of the stream, and that, to restrain future excessive overflow and prevent the banks from further washing, it was necessary to build revetments at certain places to keep the river in its channel.

The neck of land across which the new channel cut is conceded to have been very narrow; a surveyor sent by defendant to measure and compute areas, and whose testimony in that particular is not disputed, states it was not over 15 feet across it from one bank to the other, and the area washed out by this new channel was fifty-seven thousandths of an acre. The river formed quite a large loop at this point, mostly on adjoining lands; the portion of plaintiff's land within the loop being a small triangle, which was not cultivated. Defendant's testimony is to the effect that there were no such unusual results as claimed by plaintiff; that about the same amount of land was flooded and in the same manner as usual at that time of the year; that good crops subsequently grew upon the land claimed to have been injured by the deposit; that the washing of the banks and cutting of the short new channel was the natural result of the spring freshet, and did little, if any, damage. The conflicting testimony upon this subject presented, of

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course, an issue of fact for the jury within certain limits; but, according to a map of the locality upon which plaintiff and his witnesses pointed out the portions claimed to have been injured by the overflow, there were less than 3¾ acres injured by the deposits upon them. The highest estimate given by any of them was 5 acres. The trial judge, in his charge to the jury, said:

"But the highest value that is put upon that land, gentlemen, is $65 (per acre). The lowest value which is put upon the land in its present condition is $10 (per acre), so that the amount of damages to be allowed for that acreage, whatever it was, if any, must be between those two extremes, and in arriving at that you will consider the testimony of the other witnesses varying from no damage at all to this $65."

The testimony sustains these statements as to the highest and lowest values, and according to plaintiff's highest and lowest estimates we find not to exceed five acres of his land were damaged $55 per acre, amounting to $275. The court further instructed the jury that by the pleadings and proceedings during the trial—

"There was no question of any bridge across the cut-off or access to lands further up the river except the damage by the soil actually taken away" and "injury to that acre and three-quarters or two acres, which was testified to in the case, the extreme value I think was put at $20 an acre, $10 or $20, but no further."

It could well be contended that the straightening of the river at this point was a benefit rather than an injury, and under the evidence of plaintiff the damage, if any, was very small.

The plaintiff did work along the river, building a breakwater, or retaining wall of timber to prevent the current further cutting away the banks and flooding his land; his estimate of the cost of this work was $557.25, and it was his claim that this was made

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necessary by the washing of the natural banks at the time of the jam. It is the contention of defendant, not only that the testimony overwhelmingly showed that this work was unnecessary, of little value, and could not have legitimately cost what plaintiff claimed (which might be a question of fact), but that the plaintiff could not recover under any circumstances more than the entire value of the maximum amount of land which he claims was damaged.

If it appeared that the injury to the acreage damaged, which was shown to be several spots distributed over different parts of the farm, depreciated the whole value of the farm, the damages would not be limited by the difference in value of the exact spots injured. The measure of damage would be the damage done to plaintiff's farm as an entirety through defendant's negligence, whatever the various elements might be.

In denying defendant's motion for a new trial, the court said: "The verdict was for a larger amount than was warranted under the charge," and it may be added, for a manifestly larger amount than was warranted by the evidence.

Accepting plaintiff's claim that defendant was responsible for all the damages he offers evidence in relation to, and rejecting all of defendant's testimony in denial and reduction of said claim, some of which is practically undisputed, and, taking plaintiff's highest estimates, we have $275 for the reduction in value of the acreage flooded, and $557.25 for labor and timber in building a breakwater, the items of which are not given, with $20 for the questionable claim by reason of the cut-off, as mentioned by the court in its charge, and adding interest from the date of the jam we find the total loss less, by a substantial sum, than the verdict rendered. It is evident that the verdict is beyond any testimony in the case to support it.

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In our opinion, a verdict for the maximum amount claimed by plaintiff in his testimony would be excessive, and contrary to the weight of evidence as disclosed by this record.

The judgment is reversed, and a new trial is granted.

MOORE, MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

FIDELITY & DEPOSIT CO. OF MARYLAND v. MAILE.

1. INSURANCE — INDEMNITY BONDS — FIDELITY CONTRACT — LIABILITY.

Plaintiff, a fidelity insurance company, furnished to the employer of one Maile a bond of indemnity against loss by reason of the default of its employee. As security, defendants gave a bond to plaintiff to save it harmless against damage or loss on the fidelity obligation, in which it was provided that the contract should be void as to claims that might arise subsequent to any default, if the employer should fail to notify plaintiff, the obligor, immediately, or as soon as practicable, thereafter. Maile rendered a monthly account in which a deficiency of $27.26 appeared. He was notified of the irregularity and advised to correct it in his next report, which, however, showed an additional shortage, and plaintiff was required to reimburse the employer. In a suit on the collateral contract defendants contended that their obligation was no more extensive than that of plaintiff and that it had been released by the employer's failure to report the first shortage. *Held*, that the requirement of the fidelity bond as to notice of default did not necessitate a report of an apparent error or honest mistake, and defendants were liable on their undertaking.

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2. APPEAL AND ERROR—TRIAL—CHARGE.
Apparently contradictory instructions did not prejudice appellants, against whose contention the point raised should have been determined as matter of law, instead of submitting the case to the jury.

3. SAME—SAVING QUESTIONS FOR REVIEW.
Points not sufficiently brought to the attention of the trial court will not be determined on error.

Error to Ottawa; Cross, J. Submitted July 1, 1913. (Docket No. 133.) Decided September 30, 1913.

Assumpsit by the Fidelity & Deposit Company of Maryland against Marshall Maile, James Moore, and William H. Ernst on a contract of indemnity. Judgment for plaintiff and defendants Moore and Ernst bring error. Affirmed.

Cross, Vanderwerp, Foote & Ross and *Walter I. Lillie*, for appellants.

Peter J. Danhof, for appellee.

OSTRANDER, J. The Grand Rapids, Grand Haven & Muskegon Railway Company held the bond of the plaintiff company, conditioned that certain employees of the railway company—

"Shall faithfully and honestly discharge their duties in the several capacities, and shall also faithfully and truly account for all moneys and property, and other things, which may come into their possession in their respective employments, whenever thereto required, * * * and the company hereby indemnifies the employer against all loss which the employer shall sustain, by reason of the default of any or either of the employees in the premises. * * *"

One Marshall Maile desired to enter the employ of the railway company as one of the class of employees whose conduct was so insured by plaintiff and was required to himself give to plaintiff an indemnity

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bond. This he did, with appellants Moore and Ernst as sureties. His bond recites the fact that plaintiff had executed, or had agreed to execute, a bond to the railway company in behalf of said Maile, "which bond by reference thereto herein is made to form a part hereof."

The condition of Maile's bond was that the obligors therein—

"Shall hold and keep harmless the company [the plaintiff] from and against any and all loss, damages, costs, charges and expenses * * * which the company shall, or may, at any time, sustain, incur, or be put to, for, by reason, or in consequence of the company having given and executed the said bond, or any continuations thereof. * * *"

The obligors further agree—

"To waive all notice of any defaults, or any other act or acts, giving rise to any claim under said bond of suretyship given by said company to said employer, * * * to the end and effect that we shall jointly and severally be and remain liable to the company under this bond whenever the company is liable under its said bond, * * * notwithstanding also any defenses of any kind that we might have been or be entitled to make."

This is the bond sued upon, and it was made to appear that the plaintiff had paid the railway company, on account of the default of Maile, $141.50. With their pleas the sureties gave notice that they would show in their defense that their liability was limited to the sum of $27.26, "for the reason that one of the provisions of said bond," the one given by plaintiff to the railway company, "reads as follows, viz.: 'That this bond will become void as to any claims which may arise subsequent to the occurrence of any act or default on the part of the employee, which may involve a loss for which the company is responsible hereunder, to the employer, if the em-

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ployer shall fail to notify the company of the same in writing, immediately or as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer'—and all claims of" the railway company which plaintiff may have paid in excess of $27.26 for alleged shortages of Maile were not recoverable under the said bond because they arose subsequently to the occurrence of an act or default of said Maile, for which plaintiff became responsible under said bond, and the employer failed to notify plaintiff of the same, in writing, immediately or as soon as practicable after the occurrence of said act had come to its knowledge.

It appeared that Maile was the agent of the railway company at Nunica from April 10, 1910, until October 3, 1910, and that, following the custom and the requirements of the company, he reported monthly to the accounting department of the road the business transacted by him. His report for July, 1910, was examined and four debit and three credit errors discovered; the balance of errors in favor of the railway company being $27.26. This was reported to Maile with the statement:

"You will on your next balance sheet debit yourself with $27.26 for balance of errors above. Balance to be carried to your debit next month."

The communication is dated September 5, 1910. In the month of October, 1910, upon an audit being made of the books kept at Nunica, it was discovered that Maile owed the company $161.50, including the item of $27.26 already referred to. His shortage for September was $133.87. Of this condition the plaintiff was notified in writing October 4, 1910. Later Maile pleaded guilty to an information which charged him with embezzling $161.50.

Appellants' principal contention is based upon the fact that the railway company did not report to the

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plaintiff the errors in the July statement furnished by Maile, discovered as early, at least, as September 5, 1910. The argument is that, because of this omission or failure, the plaintiff's liability to the railway company ceased under the terms of the bond, and appellants' liability can be no greater than the legal liability of plaintiff to the railway company.

To sustain this contention it must be held that the bond given by plaintiff to the railway company required the railway company to notify plaintiff that Maile's July statement, as corrected by the accountant, showed that he should have reported and paid $27.26 more than he did report and pay. The testimony discloses, and is not disputed, that similar errors were not infrequently discovered in the reports of agents, called to their attention and corrected in the next succeeding statement; that it was supposed that Maile had simply made an error; and that dishonesty on his part was not suspected. Maile paid over all that his July account called for. His *act* in making up the account as he did and in remitting accordingly was apparently a mistake—an error. Undoubtedly, if he had not paid the amount found to be due upon the correction of his account, a claim for that amount would have arisen upon the bond. It was not, however, to be assumed that Maile was dishonest. He was entitled to opportunity to reexamine his records and to correct the corrections made by the accountant, if he could do so. The language of the condition of the bond given by plaintiff to the railway company is:

"That immediately upon, or as soon as practicable after, the discovery by the employer of any act of any employee giving rise to a claim under this bond, the employer shall give notice thereof to the company"—with the further provision that the bond will become void as to any claims arising subsequent to the occurrence of any act or default on the part of

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the employee which may involve a loss for which the company is responsible, if the employer shall fail to notify the company of the same in writing immediately or as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer. It will be assumed that the bonds were executed with reference to the business carried on by the railway company and the supervision which such companies usually exercise over agents. In conducting business, mistakes must unavoidably occur and be corrected after they are discovered. We do not interpret the obligation of the railway company to plaintiff as requiring apparent errors in monthly reports of agents to be immediately called to plaintiff's attention. Reading the condition of the bond and the provision for its avoidance together, a fair interpretation of its meaning is that those acts of employees, or those occurrences which do not at least imply a default, are not required to be so reported. This interpretation is in harmony with the purpose of the provision itself, which is intended to secure reasonably prompt and serious supervision of agents by employers, who many conduct business according to convenient rules but may not shut their eyes to acts and circumstances implying dishonest conduct. Further than this, and also in harmony with the interpretation given, it is stated in the bond that the plaintiff shall not be liable for any error of judgment or *bona fide* mistake, nor for any injudicious exercise of discretion on the part of the employee in and about all or any matters wherein he shall have been vested with discretion.

Error is assigned upon portions of the charge of the court which are in agreement with the conclusion just stated. It is said, in argument, that, if the instructions complained about were correct, in another portion of the charge a precisely contrary instruction was given; that therefore the jury was per-

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mitted to apply either of two contradictory rules, and prejudicial error is thus made to appear. The instructions appear to be contradictory; but inasmuch as we think there was, upon this subject, no question of fact for the jury, no prejudicial error was committed.

In the brief for appellants it is urged that incompent testimony was introduced to show that a shortage greater than the sum of $27.26 existed. The argument is made in support of the first assignment of error, which is based upon an exception to a ruling which permitted a witness who had testified that he examined the books and records kept at, and relating to business done at, Nunica station to answer the question, "State to the jury what you found." The objection was that the testimony sought was incompetent, irrelevant, and immaterial. Although the reasons for the objection were stated at considerable length, they did not point out why the testimony was incompetent. And at no time was the attention of the court directed to the point that the method adopted to prove the extent of Maile's shortage was not a proper method. It is now said that the testimony was incompetent because—

"The witness was simply allowed to testify that he checked up accounts without having anything to check up from or show to the jury or the court wherein he got his items, one way or the other, from which he made up this amount of $161.50."

The books and papers referred to were admitted in evidence, without objection. It was with reference to their contents and the examination he had made of them that the witness was testifying. He was not cross-examined. The objection now made is without merit, and no proper foundation for it appears in the record.

The judgment is affirmed.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and BIRD, JJ., concurred.

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POLI *v.* JACOBS.

1. LANDLORD AND TENANT — LEASE — CONSTRUCTION — RENT — ESTOPPEL.

Where landlord and tenant mutually agreed upon an extension of an existing lease, and it was stipulated by an addition to the instrument that in case the lessor's tax assessment was increased at a date specified, the rent should be increased by three per cent. of the additional valuation, and it appeared that the lessor, being subjected to an increase in the assessed valuation, wrote to the tenant stating the amount to be paid in addition to the previous rental, and where he had received the same over a considerable interval, the landlord and his grantee were estopped to set up a mistake in the sum claimed which had been discovered by the lessor soon after sending the communication to the lessee without having made any objection or notification to the latter: the grantee of such landlord was not entitled to cancel the lease because he claimed the premises were being occupied for a different purpose than that authorized by the contract, his grantor having accepted rentals for a long period of time with knowledge of the use to which the premises were being put.

2. SAME — CONTRACTS — TAXATION.

And under the agreement that May 1st be fixed as the date when the rent should increase if a change in assessment occurred, the valuation for that year, not taking effect until May 5th, could not be considered in fixing the rental.

Appeal from Wayne; Mandell, J. Submitted January 31, 1913. (Docket No. 41.) Decided October 1, 1913. Rehearing denied January 5, 1914.

Bill by Louisa Poli against Abraham Jacobs and Julius Stroh for a decree of interpleader. Certain claimants intervened. From a decree for defendant Jacobs, said Stroh appeals. Affirmed.

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Alex. J. Groesbeck, for appellant Stroh.

Lucking, Emmons & Helfman, for appellee Jacobs.

MCALVAY, J. A bill of interpleader was filed by the principal complainant and others intervening, all being subtenants of portions of a certain building in the city of Detroit under leases from defendant Jacobs. The purpose of this litigation was to determine which of the defendants was entitled to the rentals due from said tenants. The court made an interlocutory decree ordering all tenants to pay rentals into court, and that defendants Jacobs and Stroh interplead and settle the dispute between them. Upon a hearing between the interpleaded defendants, a decree was entered in favor of Jacobs. Defendant Stroh has appealed. The material facts in the case are undisputed.

The premises in question are known as Nos. 232 and 234 Randolph street, Detroit. On June 1, 1904, John McKibbon, owner of these premises, executed duplicate leases of No. 232 Randolph street to the defendant Abraham Jacobs for a period of five years and two months, commencing March 1, 1905, for a monthly rental of $175. On June 10, 1904, he executed similar leases to defendant Jacobs of No. 234 Randolph street for the term of five years and six months, commencing November 1, 1904, at a monthly rental of $125. The terms of both leases were arranged to expire May 1, 1910. These leases did not limit the lessees' right to assign or sublease. Defendant Jacobs entered into possession of these premises under said leases at the beginning of the terms and paid $300 per month rent for the full terms of the same.

During the year 1909, probably late in the year, defendant Jacobs asked McKibbon for an extension of the leases. He gave his consent and interlined the following words in each lease, "with the privilege of

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five years more," which was not contained in the leases as originally drawn and executed by the parties. At or about the same time and in consideration of such extension, as McKibbon claims, there was indorsed on the back of his copies of said leases the following:

"The party of the second part also agrees that if on the 1st day of May, 1910, the assessment for taxes on the property has been increased from the rate assessed at the time this lease was dated, to pay 3 per cent. annually on the amount of such increase."

It is undisputed that these indorsements and interlineations were never signed by either of the parties, and Jacobs and McKibbon disagree as to the circumstances surrounding the 3 per cent. memorandum.

On April 26, 1910, McKibbon wrote Jacobs the following letter:

"DETROIT, MICH., April 26, 1910.

"MR. JACOBS,

"*Dear Sir:*

"According to the terms of your lease of the premises 232 and 234 Randolph street with the renewal of the lease after five years an increase of 3 per cent. per annum it was agreed should be added to the rent of whatever difference should have been made in the assessment on the property between 1905 and 1910, the assessment for 1905 was $46,930, the assessment for 1909 was $57,580, an increase of say $10,000. Will you therefore, commencing May 1st, make the monthly checks $325 instead of $300 according to agreement, and oblige.

"Yours truly,

"JOHN MCKIBBON."

Accepting the terms of this letter, Jacobs sent his monthly check for $325, beginning May 1, 1910, and continued the monthly payment of such amount to him by check until January 1, 1911. All of which checks were received and accepted by McKibbon.

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On February 1st Jacobs sent a check of like amount for that month and on that date received a letter from McKibbon informing him that he had sold the property to defendant Stroh and had forwarded this check to Stroh. Afterwards Stroh telephoned Jacobs in regard to the matter and met him at his office, where he claimed $49 per month additional rental, making a total of $374 per month. This amount was fixed by Stroh by subtracting the 1904 assessment of $42,270 from the 1910 assessment of $71,700 and computing 3 per cent. thereon. He also claimed 3 per cent. on any subsequent increase of assessment, all of which claims Stroh reduced to writing, by letter sent to Jacobs on the following day:

"DETROIT, Feb. 9, 1911.

"MR. A. JACOBS,
"120 Jefferson Ave.,
"Detroit.

"*Dear Sir:*

"Referring to my talk with you yesterday in relation to the rent payable for the stores on Randolph street, known as Nos. 232 and 234, I find that under the leases to you executed on the 6th and 10th of June, 1904, respectively, the rent will amount to $300 per month, together with 3 per cent. on the additional assessment from 1904 that was put on this property, which increase now amounts to $29,700. The total rent therefore payable to me under the leases will amount to $374 per month, until a further change should be made in the assessment, and until the present leases expire.

"I would therefore thank you for an additional check for $49, to cover the rent for February, inasmuch as your check to Mr. McKibbon, and mailed to me by him amounts to only $325.

"Hoping you will comply with the above, I am,
"Yours respectfully,
"JULIUS STROH."

A dispute arose between the parties over these matters, which was not adjusted. Stroh threatened

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to cancel the leases and Jacobs under protest in writing paid the extra amount demanded for four months. He then brought suit in justice's court to recover such sums as paid under duress. He failed to recover in this suit and afterwards tendered Stroh $325 each month and refused to pay more. Defendant Stroh then attempted to cancel the lease and notified the tenants to pay no more rents to Jacobs. Stroh gave complainant Poli notice to quit and similar notice was given by Jacobs to another tenant. Proceedings were instituted by each of these defendants before a circuit court commissioner to oust these tenants. The bill of interpleader was filed because of these complications.

The dispute between the parties is narrowed to the question of the construction of the agreement entered into between McKibbon and Jacobs at or about the time of the extension of the leases relative to the increase in the amount of the rent to be paid by defendant Jacobs.

It is claimed by appellant Stroh that, the premises having been occupied for purposes other than those named in the leases, there was a forfeiture of the leases. Such contention cannot be sustained for the reason that from the beginning it was well known to the owner, McKibbon, that these tenants were not occupying for the purposes named in the leases, and for all the years after until the sale of the property to defendant Stroh he received and accepted the rent from month to month without any objection that the premises were occupied for purposes other than those named in the leases. The indorsements upon the leases by McKibbon for the increase of the rent were acquiesced in by defendant Jacobs, and it may be said that there is no dispute but that in consideration of the extension of the leases for a term of five years this agreement was entered into. It was written by McKibbon at that time. Not long after, and

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before the change in rentals was to take effect, he wrote the letter of April 26th, which was received by defendant Jacobs and acted upon by the payment of the amount demanded monthly from that date until February 1, 1911. This letter is the construction of this agreement for an increased rental which McKibbon gave in writing to Jacobs. It is claimed by appellant that in writing this letter McKibbon was laboring under a mistake, and that he intended to give the increase of the assessment on this property for the year 1910. The agreement reads:

"The party of the second part also agrees that if on the 1st day of May, 1910, the assessment for taxes on the property has been increased from the rate assessed at the time this lease was dated, to pay 3 per cent. annually on the amount of such increase."

McKibbon says that he discovered in July following that he had not used the 1910 assessment in estimating the increased rental. He did use and had before him at the time his tax receipt for 1909 showing the assessment for that year. When he discovered this fact he said nothing to Mr. Jacobs, and he made no claim to him that the rentals were not increased exactly in accord with the agreement between the parties and continued to accept from him $325 on the 1st of each month thereafter until the 1st of February, 1911, which last check he turned over to his grantee, defendant Stroh. McKibbon gave this paragraph a construction which has been accepted and acquiesced in by Jacobs. Furthermore, McKibbon, after knowledge came to him of all the facts in regard to the assessment for 1910, raised no question whatever about the accuracy of the letter of April 26th but received rent from his tenant as demanded until February 1, 1911, and he never made any claim to Jacobs that an increase in rent had not been made according to the terms of the agreement.

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He and his grantee are estopped from questioning such construction.

The construction given by the parties is the true legal construction to be given to this paragraph. There is no ambiguity in this writing. May 1, 1910, was fixed in it as the date to which increased assessments could be considered. The assessment for the year 1909 next preceding was the last assessment made before that date. The assessment for 1910 was not legally in effect until May 5th of that year. *Rothschild* v. *Begole*, 105 Mich. 388 (63 N. W. 309), and cases cited.

The decree of the circuit court is affirmed, with costs of this court to defendant Jacobs.

STEERE, C. J., and MOORE, BROOKE, KUHN, STONE, and BIRD, JJ., concurred. OSTRANDER, J., did not sit.

ANDREWS *v.* AUER.

1. INTOXICATING LIQUORS — CITIZENSHIP OF SALOONKEEPER — INJUNCTION AGAINST SALOON—EVIDENCE.

   On testimony showing that defendant had admitted he was not a citizen of this country, that he had applied for second naturalization papers, but had been unable to secure them in time to aid his application for license as retail liquor dealer, and that he had made application therefor under oath, stating that he was a citizen of the United States, it is found, on appeal, that he was not naturalized and had committed fraud in his application.[1]

[1] On the question of discrimination against aliens, by statute or municipal ordinance imposing license or occupation tax, see note in 40 L. R. A. (N. S.) 281.

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2. EQUITY — INJUNCTION — JURISDICTION — FRAUD — INTOXICATING LIQUORS.

While equity has no jurisdiction to restrain the commission of a crime, a bill in the nature of an information, filed by the prosecuting attorney on relation of certain taxpayers, to restrain an alien from engaging in the business of selling intoxicating liquors at retail is within the equitable jurisdiction of the court: licenses, etc., procured by fraud from State officials or boards are subject to cancellation in equity.

3. SAME—PARTIES—PROSECUTING ATTORNEY.

The public prosecutor, authorized by the attorney general to commence suit, was a proper moving party.

Appeal from Berrien; Bridgman, J. Submitted January 7, 1913. (Docket No. 19.) Decided October 1, 1913.

Bill in the nature of an information by William H. Andrews, prosecuting attorney of Berrien county, on the relation of Judson Webber and another against Rupert Auer for the revocation of a liquor license. From a decree for defendant, complainant appeals. Reversed.

Roger I. Wykes, Attorney General, and *Coolidge, Riford & White*, for complainant.

Burns & Hillman, O'Hara & O'Hara, and *Tormey & Skinner*, for defendant.

STONE, J. This cause was commenced by an information in the nature of a bill in equity filed by the prosecuting attorney of Berrien county, on the relation of certain property owners of the city of Niles in that county, praying for an injunction to restrain the defendant from continuing the retail liquor business in the city of Niles, and that his license be canceled and surrendered.

It appears that the defendant made the usual application under oath for a license to engage in the

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retail liquor business at 119 Main street, Niles, on March 12, 1912, in which application it was expressly stated that defendant was at the time a citizen of the United States, and of the State of Michigan, and that his residence was at the number and street above stated. A license was issued to defendant by the county treasurer for the year beginning May 1, 1912, and defendant accordingly engaged in the retail liquor business at the place named in the application, where he so continues to conduct the business.

The bill of complaint was filed on June 10, 1912, stating, among other things, that the defendant was not a citizen of the United States but was born in Germany and was and is a subject of the Emperor of Germany, and that he had never been naturalized as a citizen of the United States. The bill prayed for relief as follows:

(A) That the approval of the application of defendant to engage in the retail liquor business be by the court declared null and void.

(B) That the license issued upon said application be decreed illegal, unauthorized, and void, and that such license be canceled by the order and decree of the court.

(C) That the defendant be restrained and enjoined, by an order and decree of the court, from further carrying on or engaging in such business.

The defendant answered without oath, denying the allegation of the bill that he was not a citizen of the United States.

The cause being at issue, it was heard upon testimony taken in open court, and it appeared that the defendant had taken out his first naturalization paper at Ft. Wayne, Ind.; that in February, 1912, he went to St. Joseph, the county seat, for the purpose of taking out his second naturalization paper and was informed by the county clerk that there must be a publication, and that he would not be able to get his second paper or become naturalized as a citizen

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of the United States until September, 1912. Upon learning that he could not be naturalized until September, 1912, too late to afford him any relief as to his proposed liquor license in April, 1912, defendant made no further effort to become naturalized, but on March 12, 1912, made his application, stating under oath that he was a citizen of the United States. It further appeared that defendant had admitted on different occasions that he had never obtained his final naturalization paper. The trial court refused to grant the injunction, denied the relief prayed for, and dismissed the bill of complaint. The complainant has appealed.

Upon the hearing it appeared that authority was obtained by the prosecuting attorney from the attorney general to file the bill of complaint herein.

In the absence of evidence of the defendant, we think the evidence warrants the conclusion that defendant was not a citizen of the United States. It seems to have been the opinion of the learned circuit judge that, there being no evidence that the saloon kept by the defendant was a nuisance as matter of fact, and that it was not a nuisance *per se*, a court of equity is without power to grant relief in such a case, and that the complainant should be relegated to the criminal law for his remedy.

The complainant urges that it is clearly established that the license to the defendant was obtained through and by his fraudulent and false representation of citizenship; and that under such circumstances a court of equity has the power to and should cancel the license and order its surrender, although the offense might be punished criminally under the provisions of the statute (section 36, Act No. 291, Pub. Acts 1909).[1] In support of this position our attention is called to the case of *State* v. *Zachritz*,

[1] 2 How. Stat. (2d Ed.) § 5090.

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166 Mo. 307 (65 S. W. 999, 89 Am. St. Rep. 711). That case holds that, although equity has no jurisdiction to restrain the commission of a crime, yet it has jurisdiction to enjoin a jockey club from exercising a privilege under a license fraudulently obtained, until such license may be canceled, although the statute makes the exercise of such a privilege, without a license, a misdemeanor. A footnote to the case as reported in the American State Reports above cited is as follows:

"An injunction will not issue to restrain a crime or a criminal prosecution. However, the fact that the acts complained of constitute a violation of the criminal law does not prevent their being enjoined" —citing *Paulk* v. *Mayor*, 104 Ga. 24 (30 S. E. 417, 41 L. R. A. 772, 69 Am. St. Rep. 128); *Klein* v. *Livingston Club*, 177 Pa. 224 (35 Atl. 606, 34 L. R. A. 94, 55 Am. St. Rep. 717); *Vegelahn* v. *Guntner*, 167 Mass. 92 (44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443); *Columbian Athletic Club* v. *State*, 143 Ind. 98 (40 N. E. 914, 28 L. R. A. 727, 52 Am. St. Rep. 407); *Hamilton-Brown Shoe Co.* v. *Saxey*, 131 Mo. 212 (32 S. W. 1106, 52 Am. St. Rep. 622); monographic note to *Crighton* v. *Dahmer*, 35 Am. St. Rep. 670-681.

The authority of courts of equity to cancel certificates and other instruments executed by government officials or boards, and obtained by fraud, or obtained illegally, is well established. *Vanderbilt* v. *Mitchell*, 72 N. J. Eq. 910 (67 Atl. 97, 14 L. R. A. [N. S.] 304).

The Supreme Court of the United States has repeatedly held that bills in equity will lie to cancel patents obtained from the government by fraud of the patentee. *Johnson* v. *Towsley*, 13 Wall. (U. S.) 72, and cases there cited.

In the instant case an active fraud is charged and proved. We may well lose sight of the fact that the defendant might be prosecuted criminally, for we have frequently held that the jurisdiction of a court

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of equity is concurrent with that of the law courts in cases of fraud. That is especially true where the courts of equity may grant more complete relief, where an instrument is fraudulently obtained, by compelling cancellation or surrender and by rendering equitable relief. The rule is now well established in this State that equity has jurisdiction in all cases of fraud, where complainant is entitled to relief specifically equitable, and such jurisdiction does not, in all cases, depend upon an absence of legal remedy. Where one has obtained an instrument by fraud, equity has jurisdiction to cancel it, irrespective of the legal redress that the injured party may obtain in an action at law, either as plaintiff or defendant. The following cases support this doctrine: *John Hancock, etc., Ins. Co.* v. *Dick,* 114 Mich. 337 (72 N. W. 179, 43 L. R. A. 566); *Mactavish* v. *Kent Circuit Judge,* 122 Mich. 242 (80 N. W. 1086); *Mack* v. *Village of Frankfort,* 123 Mich. 421 (82 N. W. 209); *Noble* v. *Grandin,* 125 Mich. 383 (84 N. W. 465); *Edwards* v. *Investment Co.,* 132 Mich. 1 (92 N. W. 491); *Fred Macey Co.* v. *Macey,* 143 Mich. 138 (106 N. W. 722, 5 L. R. A. [N. S.] 1036); *Hamilton* v. *Hulled Bean Co.,* 143 Mich. 277 (106 N. W. 731); *Roberts* v. *Sholes,* 144 Mich. 215 (107 N. W. 904); *Fidelity Mutual Life Ins. Co.* v. *Blain,* 144 Mich. 218 (107 N. W. 877); *Beaton* v. *Inland Township,* 149 Mich. 558 (113 N. W. 361); *Culver* v. *Avery,* 161 Mich. 322 (126 N. W. 439); *Gragg* v. *Maynard,* 164 Mich. 535 (129 N. W. 723). So without reference to the question whether a criminal prosecution or other action at law would lie, we are of opinion that the relief asked for here is peculiarly within the jurisdiction of a court of equity.

We think that the right of the prosecuting attorney to file this information upon the authority of the attorney general is recognized in *Village of Wolverine* v. *Cheboygan Circuit Judge,* 162 Mich. 713 (127 N. W. 744); *State* v. *Zachritz, supra.*

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A proper disposition of this case does not render it necessary for us to decide whether, in this State, a place where intoxicating liquors are sold contrary to law is a public nuisance *per se* or not. We are of the opinion that the complainant is entitled to the relief prayed for in his bill of complaint, and a decree may be entered in this court accordingly.

The decree of the circuit court is reversed, with costs of both courts to the complainant.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, OSTRANDER, and BIRD, JJ., concurred.

KIMBLE *v.* GILLARD.

1. FRAUD—EVIDENCE—VARIANCE—RELIANCE ON REPRESENTATIONS.
   In an action for fraud and deceit, plaintiff's admission, under oath, that the inducement which led him to make the contract in question was the fact that another person invested his money in the deal at the same time, and nothing else led him to consummate the purchase, constituted a fatal variance from the declaration, which set up the fact that plaintiff believed and relied on the representations of defendant.

2. SAME—REPRESENTATIONS—ELEMENTS OF ACTION.
   Fraudulent representations are only actionable if plaintiff relied on them: all material allegations of the declaration must be proved substantially as alleged.

3. SAME—CONSPIRACY TO DEFRAUD—JOINT PARTIES—EVIDENCE.
   Statements made by one of two joint defendants, not in the other's presence, are inadmissible to show fraud as to the absent party, unless there is evidence of a conspiracy to defraud. Evidence considered, and *held*, insufficient to establish a conspiracy.

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4. SAME—CONSPIRACY TO DEFRAUD—EVIDENCE—ADMISSIONS.
And where the cause was tried against one of two joint defendants who had been served and had appeared, the other defendant, who had not joined issue and filed a plea in abatement that was undetermined at the time of trial, could not bind the codefendant by his admissions or statements.

5. EVIDENCE—CONSPIRACY.
Declarations of a co-conspirator are competent as to a party to the conspiracy, but are not admissible until the conspiracy has been shown by other testimony.

6. SAME—COMPROMISE—ADMISSIONS.
Alleged admissions made during negotiations for compromise are privileged and should be excluded.

7. CONTRACTS—RESCISSION—TENDER—INSUFFICIENCY.
Plaintiff, who claimed to have rescinded his purchase of a moving picture theatre for fraud, failed to establish a sufficient tender, upon a record showing that he operated the theatre for a week, closed and locked it and abandoned the property without taking any steps to preserve it, later making a tender of the keys to defendant in another town, having no knowledge where the property was or what had been done with it.

8. SAME—KEEPING TENDER GOOD—RESCISSION.
In order to make a valid tender rescinding a contract of purchase it is essential to keep the tender good and to be in position at the trial to re-deliver the property.

Error to superior court of Grand Rapids; Stuart, J. Submitted April 8, 1913. (Docket No. 1.) Decided October 1, 1913.

Case by William M. Kimble against Joseph R. Gillard and George W. Weeks for fraudulent representations. Judgment for plaintiff. Defendant Gillard brings error. Reversed.

Smedley, Hall & Gillard, for appellant.

Cleland & Heald, for appellee.

MCALVAY, J. A judgment was recovered by plain-

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tiff in an action for damages for fraud against defendant and appellant and his codefendant, George W. Weeks. The action arises out of a sale of a vaudette located in Ann Arbor, Mich. It was commenced by declaration in the circuit court for Kent county November 5, 1910. Service was had on appellant November 9, 1910. On March 31, 1911, the declaration was served upon defendant Weeks at Detroit. The trial was commenced April 12, 1911, before the time for the appearance of defendant Weeks had expired. No appearance had been entered by him at the time of trial, and he was not produced as a witness. On April 13, 1911, a judgment was rendered against both of the defendants for $750. On April 14, 1911, Weeks appeared in the case and filed a plea in abatement, a demurrer to which was sustained. Later he filed a second plea in abatement, coupled with a plea of the general issue, under the statute. Plaintiff demurred to this plea, which demurrer has not yet been determined.

The facts in the case necessary to understand the somewhat complicated issues are as follows: Defendant and appellant started this vaudette, or moving picture show, in Ann Arbor in 1907 and continued until June, 1908, at which time James H. Gillard, his brother, came there to attend the university and purchased the property from him. Appellant then went to Marquette to practice law until December, 1909, when he removed to Grand Rapids and later became a member of the law firm of Smedley, Hall & Gillard. In March, 1910, James H. Gillard sold the property to a man named Gillman under a contract and moved to California. He gave appellant a power of attorney to care for his interest in the property with full power to sell. Later in the same year, this defendant being at St. Joseph, Mich., on business, he met the defendant Weeks, who at the time was a traveling salesman for the National Film

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Company, with whom he was slightly acquainted and who knew of the Ann Arbor property. He was informed by appellant of the sale to Gillman and his default in payments. After some conversation as to the price and terms, he testifies that he told Weeks he could purchase it for $750; that Weeks indicated he might take another person into the deal with him. He next heard from Weeks by long distance telephone, who, having been informed that he was still ready to sell, stated that he had found a man ready to go in with him and pay $750, as appellant understood it; that appellant told him to bring the man over and he would make the deal. Gillard then went to Ann Arbor to investigate the condition of the property. Gillman had paid nothing after the first payment and he could get no money from him or any satisfaction, and he informed Gillman he intended to sell.

Two or three days after this trip, and on October 19, 1910, Weeks came to Grand Rapids with plaintiff for the purpose of purchasing the property. He telephoned this fact from the depot and asked the location of his office. Appellant told him and met them as they left the street car. Some negotiations were had at appellant's office during which he claims plaintiff was told by him that he could give possession within two weeks; that he expected to have trouble with Gillman, perhaps a lawsuit, but he would defend it without cost to him. Terms were agreed upon, and appellant, as attorney in fact for his brother, sold and transferred the property in question for the sum of $750 to the plaintiff by written bill of sale and drew an agreement between Weeks and plaintiff at their request that Weeks could acquire a half interest in the business later on certain terms. He also drew a promissory note for $200 from plaintiff to Weeks.

Plaintiff's version of this transaction is as follows:

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That he was at Cadillac about the 18th of October, 1910, having sold his vaudette at Reed City, which he had operated for two years; he was out of business; that he met defendant Weeks, with whom he had an acquaintance because of his business, which was selling films to picture shows, and asked him if he knew of a moving picture show for sale; that Weeks told him of the Ann Arbor property, with which he said he was well acquainted; that it was a good paying business which could be bought from Mr. Gillard of Grand Rapids for $950; that he would put $200 into it and assured plaintiff it was all right; that he would at once go to Mt. Pleasant, telephone Gillard at Grand Rapids, and let plaintiff know about 6 o'clock; that at 3 o'clock Weeks telephoned him, saying: "I have purchased $200 on that place. I want you to meet me there (Grand Rapids) at 4 o'clock"—and further said he had wired the $200, and that if plaintiff did not take the property he would lose the $200; that by appointment plaintiff went to Grand Rapids October 19th and met Weeks at the depot, went to a hotel near by, and heard Weeks telephone to somebody and was allowed to state what he heard; that they then went to Gillard's office, where the papers were at once drawn by appellant. He claims that he said he did not like to take the place without seeing it; that both defendants said it was all right, and he said he would take it; that appellant said something about the amount of business it had done during some weeks previous, to which he paid no attention. He does not recollect that appellant said anything about transferring a good title, but there was talk about giving him possession. He says that he signed a note to Weeks for $200, but he did not know what was in the contract he signed with Weeks, who took it away. He did not get a copy of it there but later at Ann Arbor got from Weeks what he said was a copy. He paid

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$750 to appellant at Grand Rapids when the bill of sale was made out and went to Ann Arbor October 24th following, where he met appellant, who gave him possession as he agreed; that he ran the business one week, until the 29th, when he locked the door of the vaudette with this property in it and left it there; that he made no provision for taking care of it, never saw it again, and did not know where it was at the time of the trial. The only tender that he made to appellant was on November 3, 1910, when he offered him the keys at Grand Rapids, which he refused to accept.

The principal errors assigned and relied upon by defendant and appellant will be considered. The first relates to the question of claimed variance between the averments of the declaration and the proofs. At the close of plaintiff's case this appellant moved for a directed verdict in his favor for the reason, among others, that there was a fatal variance between the declaration and the proofs. The motion was argued and denied.

The principal allegations in his declaration relied upon by plaintiff are:

First, that the defendant falsely represented he had a right to sell the property as attorney in fact for his brother and such sale was in violation of Gillman's rights; *second*, that defendant falsely stated to plaintiff the amount of the receipts of the business during three weeks preceding the sale; *third*, that defendant falsely stated that the property was paid for; *fourth*, that defendant told plaintiff that Weeks had paid him $200 on the purchase price, which he would forfeit unless Kimble paid the $750; *fifth*, that defendant met Weeks at St. Joseph and entered into a secret arrangement with him whereby Weeks was to induce plaintiff to buy this property, for which defendant was to allow Weeks for such service all of the purchase price over $750.

The declaration avers that all of these representa-

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tions were believed and relied upon by plaintiff, and that he would not have purchased the property if they had not been made. The first and third allegations were taken from the jury by the court on the ground that there was no proof to sustain them.

After the motion referred to was made, an amendment to the declaration was allowed to cover one of its objections, that the declaration was fatally defective if a rescission of the contract was claimed, in that it showed no tender of the property to defendant. Plaintiff was then recalled and upon examination by his own counsel, after testifying as to the claimed tender, gave the following testimony:

"*Q.* What was it, Mr. Kimble, that induced you to enter into this contract to purchase?
"*A.* Mr. Weeks.
"*Q.* What about Weeks?
"*A.* I thought if he was willing to put his money into it, I was mine.
"*Q.* Was there anything else that led you to do it?
"*A.* Nothing, only that."

As far as the representations of appellant to plaintiff, relied upon in the declaration, whereby plaintiff claimed to have been defrauded, are concerned, the foregoing quotation from his testimony fatally varies from the declaration, and the court was in error in not so holding.

It is a well-settled rule, familiar and fundamental, that, in order to make misrepresentation actionable, there must be a reliance upon the representation. *Parker* v. *Armstrong*, 55 Mich. 176 (20 N. W. 892); 20 Cyc. pp. 108, 109, and cases cited.

All the material allegations relied upon in an action for damages for false representations must be proved substantially as alleged. The motion of defendant for a directed verdict should have been granted upon this ground.

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Appellant contends that there is no evidence of a conspiracy in the record, properly admitted, which tends to support the fifth allegation, which relates to the conspiracy between appellant and Weeks entered into at St. Joseph. Our examination of the testimony received in evidence statisfies us that such contention is correct. Plaintiff relies upon the testimony of himself and his brother-in-law, Shoenhals, as evidence to show a conspiracy on the part of appellant. This testimony relates to conversations had with Mr. Weeks at Cadillac in the absence of appellant relative to the property in question and that it could be bought for $950. At the time this testimony was admitted, objection was made, and the court ruled that it was not relevant or material unless a conspiracy between appellant and Weeks was shown.

Another item of evidence relied upon to support this contention was testified to by plaintiff to the effect that Weeks had told him he put $200 into this purchase, and if plaintiff did not buy it at $750 he would lose his $200. This was part of a conversation between plaintiff and Weeks in the absence of appellant. This testimony was not admissible. The case was not at issue as to Weeks. His statements made in the absence of appellant could not bind him. The objection of the appellant should have been sustained to this testimony and it should have been excluded.

It was also not admissible for the further reason that it purported to be the admissions of a co-conspirator and no conspiracy had been shown. *Solomon* v. *Kirkwood*, 55 Mich. 256, 261 (21 N. W. 336, 338), in which Judge COOLEY said:

"The declarations of a conspirator may be evidence against his associates after the conspiracy is made out; but to receive them as proof of the conspiracy would put every man at the mercy of rogues. We find in this case no evidence of the conspiracy ex-

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cept in the statements of Hollander; and, those having been erroneously received, there was nothing on that branch of the case to submit to the jury."

See 6 Am. & Eng. Enc. Law (2d Ed.), p. 868.

Plaintiff was allowed to testify also, over objection, that he heard Weeks at Grand Rapids over the telephone state something about $200, and afterwards when they arrived at the office of appellant he heard Weeks say to him, "Did you get that?" and appellant's reply that "he did."

The court on rebuttal also admitted, over objection of appellant, the testimony of one of plaintiff's attorneys detailing a conversation had between him and appellant before suit was commenced, claimed to be an admission tending to show this conspiracy. The objection made was that it was not rebuttal and that it was a conversation prior to bringing suit, had for the purpose of a compromise. The court sustained the first objection, whereupon plaintiff recalled appellant to lay the foundation for the testimony. He denied that he made the statement claimed and testified that whatever was said was expressly with reference to a compromise between the parties. This was not denied by the witness when upon the stand. The court refused to strike out the testimony. For the reason stated, it was inadmissible and should have been stricken out.

The testimony relied upon by plaintiff to show admissions, if taken as true, would not sustain the contention that a conspiracy was entered into by him to defraud plaintiff. No testimony was introduced in the case supporting the fourth averment of the declaration that appellant told plaintiff that Weeks had paid him $200 down on the purchase, which Weeks would forfeit if plaintiff did not pay $750. It therefore requires no consideration.

In a second motion, as well as in a third, made by appellant for a directed verdict, was included the

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reason that there was no showing made by plaintiff that he was at any time in a position to return the property to appellant. These motions were both denied. The record shows that plaintiff went to Ann Arbor and was given possession of this property by appellant on or about the 24th day of October; that he kept it and conducted the business until the 29th, when he locked it up and left it. He testifies:

"I did not take any steps to preserve this property. I just abandoned it, just locked it up, and let it go; that is all."

He has never seen it since and did not know where it was at the time of the trial.

The tender claimed to have been made, as testified to by plaintiff, was not in law a tender of this property. It had at that time been abandoned by him, and there is no showing made that he was then in a position to deliver it to appellant. At the time of the trial he was not in a position to make the tender good, and his testimony shows he did not keep it good or have any possession of it after he abandoned it. A party who seeks to rescind a contract is required to make a tender and keep such tender good and must show at the trial that he is able to deliver the property to the defendant. *Ortmann* v. *Fletcher,* 117 Mich. 501, 504 (76 N. W. 63); *Potter* v. *Taggart,* 54 Wis. 395 (11 N. W. 678); *Jewett* v. *Petit,* 4 Mich. 508. The motion to direct a verdict for this reason should have been granted.

Other errors are assigned upon the admission and rejection of evidence, the charge of the court, and refusals to charge as requested by appellant, which do not require consideration.

For the errors pointed out in this opinion the judgment of the superior court against appellant is reversed, and a new trial granted.

STEERE, C. J., and MOORE, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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COKE *v.* MICHIGAN CENTRAL RAILROAD CO.

RAILROADS—MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE OF BRAKEMAN—VIOLATION OF RULE AGAINST COUPLING ON DEFECTIVE CARS.

Violating a rule of defendant railroad company, plaintiff, a brakeman, having notice that a freight car carried a defective automatic coupling, attempted to open the coupling by hand so as to make up the car as part of his train, although, under the provisions of defendant's rule, it should have been put out of the train; in an action for personal injuries a verdict for defendant by direction of the trial judge is sustained on the ground that plaintiff was guilty of contributory negligence. OSTRANDER and MOORE, JJ., concurred on the ground that defendant's negligence, relied upon, was not the proximate cause of plaintiff's injury.[1]

Error to Ogemaw; Sharpe, J. Submitted April 9, 1913. (Docket No. 14.) Decided October 1, 1913.

Case by Russell E. Coke against the Michigan Central Railroad Company for personal injuries. Judgment for defendant on a verdict directed by the court. Plaintiff brings error. Affirmed.

Abbott & Abbott, for appellant.

George M. Humphrey (*Cooley & Hewitt*, and *Humphrey & Grant*, of counsel), for appellee.

KUHN, J. This action was brought by the plaintiff against the defendant to recover damages for injuries received on January 22, 1909, while in the employ of the defendant as a freight and yard brakeman.

[1] The question of a servant's disobedience to rules regulating the work of coupling cars is treated in a note in 43 L. R. A. 364.

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On the night of the accident, while in the yards at Grayling, Mich., the plaintiff was ordered to couple onto about 30 cars standing off the main line of the defendant company, and proceed with them to Bay City. However, as a passenger train was about due, the plaintiff received orders to proceed to the depot, and there received orders to back into the clear of what was known as "engine lead," in order to let the passenger train pass. The order to back into the "engine lead" also involved another order to pick up 10 cars of merchandise that were located on a sidetrack, No. 1. Upon attempting to back into "engine lead," it was discovered that the train was too long for the lead, and plaintiff was ordered to cut off the engine and head car and proceed with the same to sidetrack No. 1, where the 10 cars of merchandise were to be picked up. In order to comply with this order, the plaintiff undertook to uncouple between the first and second cars in the train by the use of the uncoupling devices with which the cars were equipped. He was on the left side of the train, and tried to pull the pin to make the uncoupling by using the lever at the head of the second car. This lever runs out on the end of the cars to the outside, so that the brakeman would not have to go between the cars to open the coupler. He tried it several times and jerked and pulled, and also signaled the engineer to start and back his train a number of times; but the uncoupling device would not work, and he then climbed over one of the cars to the opposite side of the train and made use of the lever on the head car, which worked and resulted in uncoupling the cars. Plaintiff then signaled the crew of the engine to go ahead in the direction of sidetrack No. 1, and, as soon as the engine and car passed out of view, stepped in between the tracks at the end of the car, and stood looking at the drawhead with his lantern on the wrist of his left hand. He placed his left hand

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on the knuckle, and took hold of the pin in an effort to see if the pin could be released, and while thus engaged, through some misunderstanding of signals, the engine and car backed into and against the car which the plaintiff was examining, and plaintiff's left hand was caught between the drawheads of the two cars and severely injured. The accident occurred about 12:15 o'clock at night, and it was very dark and rainy.

Plaintiff's declaration counts upon a violation of Act No. 234 of the Public Acts of 1907 (3 How. Stat. [2d Ed.] § 6729 to 6731), which made it unlawful for the defendant to use on its lines within this State any car not equipped with couplers which could be coupled automatically by impact, and which could be uncoupled without the necessity of men going in between the ends of the cars. At the close of the plaintiff's case, the court directed a verdict for the defendant, and the question that now presents itself is whether, under all the evidence, the case should have been submitted to the jury.

The only evidence before the court was that given by the plaintiff himself. It was urged in the court below, and is also here, that the undisputed proofs conclusively show that plaintiff himself was guilty of negligence which contributed to his injuries. It was shown that one of the rules of the company, known as No. 629, provided as follows:

"Inasmuch as the couplers of cars or engines cannot be uniform in style, size, or strength, and are liable to be broken, and dangerous to those engaged in coupling them, all employees are enjoined, before coupling cars or engines, to examine and know the kind and condition of the drawhead, drawbar, bumper, link, and coupling apparatus, and are prohibited from placing in the trains any car with a defective coupling, until they have first reported its defective condition to and receive instructions from the yardmaster or conductor. Sufficient time is al-

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lowed and may be taken by employees in all cases to make the examination required."

It appears by a writing signed by the plaintiff that he was furnished with a copy of the printed rules and regulations of the company, and that he had read rule 629, and had agreed to make himself familiar with it and govern himself by it.

It is claimed that plaintiff was, at the time of the accident, endeavoring to do his duty under the existing conditions, and that his first duty under this rule was to make an inspection of the defective coupler, and if he found it to be in improper condition, then to make the report as required by the rule. It appears that at the time of the accident the conductor of the train was at the depot, and the yardmaster in close proximity, as he was the first person to come to plaintiff's assistance after the accident. It is urged on the part of the defendant that the record does not warrant the claim made by plaintiff, and that as a matter of fact the plaintiff, knowing that the coupler was defective, went into the place of danger to attempt to make it possible to make a coupling with the defective car in order that it could be hauled to Bay City, and had no intention of notifying either the conductor or yardmaster, and was admittedly violating the rule. The testimony of the plaintiff with reference thereto was as follows:

On direct examination:

"I then gave the engineer the signal to go ahead. I stepped in after that, and the engineer went ahead. Then he went out of sight; he wouldn't have gone over 20 feet to go out of sight that night. It was very dark, rainy, foggy night. I then commenced to see if I could get this coupler open on the head end of the second car, so that when I went to couple on again I would have a coupler ready to couple onto, so I wouldn't have to stop and open the knuckle."

On cross-examination:

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"After I had uncoupled, I gave the signal for the engine to go ahead, and they went out of sight. I had a lantern with me. After I gave the signal, and they started, I waited for them to pull away out of sight, which was about 20 feet, before I went in. I didn't hear the engine when it stopped.

"*Q.* Didn't pay any attention to that?

"*A.* No, sir.

"*Q.* Then you went right in front of this coupler, did you?

"*A.* Not direct in front; no, beside it.

"*Q.* I think you said you turned your back toward the engine?

"*A.* I did.

"*Q.* Well, if you turned your back toward the way the engine went, you were fronting the coupler, weren't you?

"*A.* I was fronting toward the car, but not direct in front of the coupler. I was alongside of the coupler. I was about even with the end of the coupler.

"*Q.* Now describe what you did with your hands, what you did?

"*A.* I placed my left hand on top of the knuckle, took hold of the top of the pin, and tried to work it up, at the same time pushing up with my left hand. I tried to pull up the pin.

"*Q.* Well, when you tried to do that, was that when you discovered that the coupler had something wrong with it?

"*A.* No, sir; I discovered that when I tried to uncouple from the other side. I discovered that the lever would work, but that the pin would not. The lever would work to a certain extent so far as the pin would allow it to go. I couldn't draw the pin with the lever. When I tried to work the pin up with my hand, I discovered that it was jammed and pounded up.

"*Q.* Well, didn't it suggest itself to you that that was an improper car to be hauled by the company?

"*A.* Yes, sir; it did.

"*Q.* You thought that the coupler was so defective that the car ought to be put out of the train?

"*A.* Yes, sir.

"*Q.* Did you tell anybody to put it out?

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"*A.* No, sir; there wasn't anybody there to tell.

"*Q.* Why, I thought you said that Yardmaster Richardson was right there and helped you over to the depot after your injury?

"*A.* He came just at that time that I got hurt. He wasn't there at the time I was working on this knuckle.

"*Q.* Well, you know that he was round there?

"*A.* Well, I don't know just where he was, no. I had seen him before, and I knew that there was a yardmaster on duty there some place in the yard.

"*Q.* Why didn't you report it to the conductor?

"*A.* My conductor was in the depot getting orders.

"*Q.* Certainly, why didn't you go over and tell him there was a defective car there unfit to be hauled?

"*A.* Well, I was going to try first, and see if I couldn't get it open.

"*Q.* But you had determined in your own mind that it was not a fit car to be hauled, hadn't you?

"*A.* I had in a way, yes.

"*Q.* Why didn't you go and tell the conductor so?

"*A.* Well, I hadn't thought of it yet.

"*Q.* Hadn't thought of it?

"*A.* No, not yet, I hadn't.

"*Q.* What were you adjusting the knuckle for?

"*A.* To get it open, and have it open and ready to couple on when I come back to it.

"*Q.* Then you were going to couple those cars onto it?

"*A.* Yes, sir.

"*Q.* To the end of that defective car?

"*A.* Yes, sir.

"*Q.* What for, to haul it to Bay City?

"*A.* Yes, sir.

"*Q.* Why didn't you tell the conductor?

"*A.* Well, I hadn't thought of it yet.

"*Q.* You intended to leave it in the train and haul it to Bay City without calling anybody's attention to it?

"*A.* I was intending to speak to my conductor when I got a chance.

"*Q.* Well, then, when the engine and other car had left it, why didn't you report it and uncouple it to be taken out?

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"*A.* I hadn't thought of that yet."

It seems to us that the irresistible conclusion from this evidence is that the defendant's contention is the correct one. At no time does he state that his purpose in going in between the tracks was to make the examination required by the rule, but does positively say that his purpose was to get the knuckle open, "and have it open and ready to couple on when I come back to it," although he admitted that he knew at the time that the coupler was so defective that the car ought to be put out of the train. Under the repeated rulings of this court, such conduct on the part of the plaintiff has been held to be such contributory negligence as to bar recovery. *Lyon* v. *Railroad Co.*, 31 Mich. 429; *Gardner* v. *Railroad Co.*, 58 Mich. 584 (26 N. W. 301); *Brennan* v. *Railroad Co.*, 93 Mich. 156 (53 N. W. 358); *Wilson* v. *Railroad Co.*, 94 Mich. 20 (53 N. W. 797); *Lendberg* v. *Mining Co.*, 97 Mich. 443 (56 N. W. 846); *Loranger* v. *Railway Co.*, 104 Mich. 80 (62 N. W. 137); *Whalen* v. *Railroad Co.*, 114 Mich. 512 (72 N. W. 323); *Fluhrer* v. *Railway Co.*, 121 Mich. 212 (80 N. W. 23); *Moyer* v. *Railroad Co.*, 159 Mich. 645 (124 N. W. 542); *Jones* v. *Railroad Co.*, 168 Mich. 1 (133 N. W. 993).

This conduct was also in violation of a penal statute of this State (section 6286, 2 Comp. Laws [3 How. Stat. (2d Ed.) § 6640]:

"It shall be the duty of every railroad corporation in this State to furnish to each of its employees of every grade a printed or written copy of its rules and regulations relative to their respective duties, and any conductor, engineer, servant or other employee of any such railroad corporation, who shall knowingly violate any of the printed or written rules or regulations of such company, shall be subject to a fine of not less than twenty-five dollars nor more than one hundred dollars, or to an imprisonment in the county jail not more than three months, or both

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such fine and imprisonment, in the discretion of the court."

If he had performed the duty imposed upon him by the rule, and, as soon as he had determined that the coupler was defective, reported the fact to his conductor or yardmaster, the accident would undoubtedly not have occurred. The injuries are therefore directly attributable to his own negligence.

For the reasons stated, a verdict for the defendant was properly directed, and the judgment is affirmed.

STEERE, C. J., and MCALVAY, BROOKE, STONE, and BIRD, JJ., concurred with KUHN, J.

OSTRANDER, J. *(concurring).* It is alleged in the declaration that after effecting the uncoupling of the car plaintiff discovered that the coupling would not automatically adjust itself for recoupling;

"that it was the duty of plaintiff, pursuant to orders given him, to recouple the engine and other car to the said car in question, and thereby connect up his train for its departure."

It is further alleged that—

"Accordingly, when plaintiff observed that said defective coupling on said car would not automatically adjust itself so as to automatically couple onto the other cars to which the engine was attached, the plaintiff, as his duty required, undertook the work of adjusting the same by hand, and in his efforts so to do,"

—and while he was so employed, the engine and forward car were backed into the car upon which he was working. There is no dispute about the facts. Plaintiff claims that the duty he was performing is imposed by rule No. 629. The trial court was of opinion that the rule imposed no such duty. Upon the argument I was impressed that only by a technical and impracticable interpretation of the rule could it be said that plaintiff was forbidden by the rule to

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make further examination of the coupler to ascertain whether the engine could be coupled to the car. Setting aside the rule, it would seem to be a proper thing for him to make the examination. There were 28 cars behind it on the siding, and, whether it should or should not be determined upon his report to carry the car to Bay City, it was necessary to move it in order to release the other cars. But the court also said, "There is no negligence shown on the part of the company that caused or contributed to his injury," and with this view I concur. Plaintiff, assuming that he was doing his duty, was injured, not because the coupler was defective, but because of what occurred after its condition was discovered. *Betterly* v. *Railroad Co*, 158 Mich. 385 (122 N. W. 635), is an instructive case.

I concur in affirming the judgment.

MOORE, J., concurred with OSTRANDER, J.

SMITH *v.* SMITH.

1. MORTGAGES—DEED AS SECURITY—PRESUMPTIONS.
   In construing an instrument claimed to be a mortgage, but appearing on its face to be an absolute deed, the proof ought to be sufficient to overcome the presumption that the instrument is what it purports to be; evidence that it was intended merely as security should be clear and convincing.

2. SAME—EVIDENCE.
   Conflicting proofs relative to the intention of decedent grantor to execute a deed to his son as security for an

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indebtedness reviewed, and *held*, to support the trial court in finding that the deed was absolute.

Appeal from St. Clair; Tappan, J. Submitted April 10, 1913. (Docket No. 29.) Decided October 1, 1913.

Bill by James B. Smith against Angus M. Smith for the cancellation of a deed. From a decree for defendant, complainant appeals. Affirmed.

Burt D. Cady and *John B. McIlwain*, for complainant.

Walsh & Walsh, for defendant.

KUHN, J. The original bill of complaint in this cause was filed to set aside a deed, given by Abram Smith to his son, Angus M. Smith, of certain lands in St. Clair county, Mich., alleging that at the time of the execution of the deed the father was mentally incompetent to transact business. Upon this bill the case proceeded to a hearing, and at the conclusion of the proofs complainant asked leave to amend his bill so as to have the deed declared a conveyance in trust to Angus Smith for the purpose of selling the land and property, or as a security to him for what was due and owing to him by Abram Smith, if any amount was owing him, and that a full and complete accounting be ordered of the amount due Angus. The circuit judge allowed the amendment, and dismissed the bill. He found that Abram Smith, at the time of the execution of the deed in question, was in full possession of his mental faculties, and thoroughly understood the nature of his act when he made the deed, and that it was not intended as a mortgage. As the findings of the circuit judge give a succinct and clear statement of the matters in controversy and of his conclusions, they are herewith set forth in full:

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"The bill of complaint herein is filed by James B. Smith, complainant, for the purpose of setting aside a certain conveyance of real estate described, and asking for an accounting of the partnership affairs and the accounts of the corporation of Abram Smith & Son.

"The pleadings and proofs show that prior to 1890 Abram Smith was conducting a shipyard at Algonac, this county, at which was built and repaired wooden vessels. It is shown that he had become quite heavily involved in debt, and, at his request, his youngest son, Angus M. Smith, defendant herein, left employment in Ohio and joined his father in a copartnership under the firm name of Abram Smith & Son, and under this copartnership they continued the business of building and repairing wooden vessels. This copartnership continued for a number of years, when the business was incorporated under the name of Abram Smith & Son; the entire stock of the concern being held by Abram Smith and Angus M. Smith, with the exception of one share, which was held by a daughter of Angus M. Smith. In the conduct of the business of the copartnership and the corporation, Abram Smith took a more or less active part until within about the last three years before his death, which occurred January 20, 1910. During the continuance of the copartnership it appears that Angus M. Smith, the defendant, conducted a separate wholesale and retail coal business, and throughout the entire period, both of the copartnership and the corporation, borrowed considerable sums of money at the German-American Savings Bank of Detroit.

"The taking of the proofs has occupied the court for fully three weeks of time; a large portion of the evidence received being directed towards an examination of the books of account of the copartnership and also of the corporation, together with the account of the corporation at the German-American Savings Bank. At the close of the proofs, solicitors for the defendant announced to the court that he would not be requested to attempt to summarize accounts, or to determine on which side of the account between Abram Smith and Angus M. Smith the balance lies. It was suggested, however, that the court refer the

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matter of an accounting to a circuit court commissioner.

"The proofs show that at the time of his death Abram Smith was 89 years of age. He was born in the township where he died, and had throughout his life been a man of exceptional vigor, of strong mentality, and high standing as an energetic and able business man. During the latter part of his life he had ceased to take an active part in the direct management of his business affairs; his eyesight had become quite seriously impaired, but the proofs show that even during this period he retained a strong mental grasp on affairs in his family, concerning such business matters as were brought to his attention, and a comprehension of the general news of the day, both local and national.

"It appears from the proofs that on July 5, 1904, Abram Smith procured John M. Robertson, a magistrate of Algonac, to draft for him a will, which he executed. By the terms of this will he gave to his son John A. Smith a certain parcel of real estate, and the balance of his property, real and personal, he left to his remaining children, James B. Smith, the complainant herein, Cornelia Seaman, a daughter, Ella M. Moore, a daughter, and Angus M. Smith, the defendant herein, in equal shares. This will was admitted to probate in this county on the 9th day of March, 1910, when it was allowed as the last will and testament of the deceased. It also appears from the proofs that on December 19, 1907, Abram Smith conveyed to his son Angus M. Smith, defendant, a farm of 320 acres, located on the river St. Clair, a short distance above the village of Algonac, being private claim 199, in township 3 N., range 16 E., which deed of conveyance was recorded on the 20th day of December, 1907, in Liber 180 of Deeds, p. 612. The consideration named in this deed was $24,000. By the allegations of the original bill of complaint it is sought to have this conveyance set aside on the ground of mental incompetency, undue influence, and fraud.

"Upon the hearing it was shown that at the date of the execution of this deed by Abram Smith, Angus M. Smith, the grantee, drafted, executed, and delivered to his father, Abram Smith, a written agree-

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ment, to the effect that in case Angus M. Smith should sell the farm conveyed to him during the lifetime of his father, Abram Smith, then Angus should pay to his father the excess above $24,000 received as the proceeds of the sale. This agreement also recited that the consideration of $24,000 was comprised of a certain mortgage against the farm given to Mr. Whitney by Abram Smith, a mortgage given to Angus M. Smith, and certain other considerations. The agreement was signed by Angus M. Smith and Abram Smith.

"After the close of the proofs, and upon the final argument of counsel, counsel for complainant proposed an amendment to the bill of complaint, and by this amendment set up the allegation that this agreement and the deed constitute a mortgage against the farm for $24,000, and by the same amendment asked an incorporation in the bill, as amended, of a prayer that the court declare the agreement to be a mortgage, and that an order or decree be entered directing a sale of the property and the payment of the excess to the estate of Abram Smith. The solicitor for the defendant objects to the allowance of this amendment, and made the request in open court that in case the court should allow the amendment that he be permitted to offer proof as to the value of the farm in question.

"It is my conclusion that all questions raised should be settled by this litigation, and for that reason I shall allow this amendment to be made, and the bill will now stand as the amended bill of complaint. Solicitor for defendant will be permitted to offer such further proof as he may deem necessary in view of the amendments allowed.

"Mental Incompetency, Fraud, and Undue Influence.

"It is my conclusion that not only has complainant failed to establish his allegations of the mental incompetency, undue influence, and fraud in the procurement and execution of the deed of conveyance of the farm in private claim 188 on December 19, 1907, but, on the contrary, the proof is clear and convincing that on that date Abram Smith was in the full possession of his mental faculties, and competent to com-

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prehend and did comprehend the nature of the transaction, and that he was conveying this farm to the defendant, Angus M. Smith. The proofs show that he went alone from his home to the office of John M. Robertson, who had drafted his will and other papers and conveyances for him, and informed Mr. Robertson that he wanted to convey this farm to his son Angus; he directed him to obtain the description and draft the deed, and bring it to his home for execution. All of these directions were given solely by Abram Smith to Mr. Robertson. Mr. Robertson prepared the instrument, took it to the home of Mr. Smith, and in the presence of his two daughters, Mrs. Seaman and Mrs. Moore, read the instrument to him, after which he executed the deed, and it was witnessed by the two daughters and Mr. Robertson. Both of these daughters testified as to these facts, and that their father was fully competent to understand and did understand, the transaction, and that there was no influence whatever exerted upon him in the procurement or execution of this instrument. These two witnesses are not only not interested in sustaining this deed, but, should it be set aside, would, under the terms of the will, each be entitled to a one-quarter interest in this farm. In addition to this evidence, the evidence of citizens and neighbors who had known Abram Smith, some of them a lifetime, all are positive in their opinion that he was mentally competent to execute this instrument. Under these proofs it is my conclusion that the deed in question was executed by Abram Smith, with a full comprehension as to its import and character, and without undue influence or fraud of any sort.

"Is the Deed of December 19, 1907, a Mortgage?

"By the allegations of the amended bill the question is now raised as to whether the deed of December 19, 1907, is an absolute conveyance or a mortgage for $24,000. Inasmuch as the case may be determined upon the proofs as they now stand, I deem it advisable to determine this question at this time. Much time was spent by counsel for complainant in an inquiry as to the character of this transaction, and in an attempt to show that the deed was to operate merely as a security and not as an absolute con-

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veyance. The evidence of Mrs. Moore and Mrs. Seaman is to the effect that the father frequently announced his intention of giving this farm to Angus, stating as his reason that Angus had come to his relief at a time when he needed assistance, that he had assisted him financially, and helped him pay his debts, and that he thought in view of all that he had done that Angus should have the farm. A considerable time after the deed had been executed Abram Smith told his lifelong friend, Mr. Stewart, that he had given the farm to Angus. As opposed to this, not a witness has given evidence to indicate that this transaction was the creation of a lien on the farm. We have the proposition that this agreement of December 19, 1907, signed by Abram Smith and Angus M. Smith, shall, in itself, without any further proof, operate as a mortgage, notwithstanding all of the positive evidence to the effect that Abram Smith intended, by the deed of conveyance, to convey an absolute title to his youngest son. It is my conclusion, as a matter of law and fact, that this agreement does not operate to constitute the deed in question as a mortgage merely; but that instead the conveyance of December 19, 1907, executed by Abram Smith, conveys an absolute title in fee simple in the defendant, Angus M. Smith.

"Further Accounting.

"At the close of the proofs, and upon the argument of counsel, for the first time the court was informed that under the proofs as taken the court would not be asked to strike a balance and determine the state of the account between Angus M. Smith and his father, Abram Smith. Upon petition of complainant's solicitor the court had entered an order granting complainant's solicitors and assistants all access to the books of account, checks, bills, and bank account of the copartnership and the corporation at the office of the corporation at Algonac. In pursuance of this order solicitor for complainant procured the assistance of an accountant, who was given full access to all of the books of account, checks, bills and bank books of the concern, and the proofs show that he spent about a week in the performance of this work at the office of the corporation, and in addition he was present in court a considerable part of the

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time while the proofs were being taken as to these accounts. It was the understanding of the court that this time was being spent for the purpose of determining the exact account for use in the case an accounting was deemed necessary. It is my conclusion that no further steps should be taken in relation to the matter of an accounting, and this finding concerning this phase of the case is made solely for the purpose of settling this question with the others presented."

The record is voluminous, containing 840 pages of printed matter, and no effort seems to have been made to reduce it to narrative form or to eliminate immaterial matter. A large amount of the testimony is directed to the claim made in the original bill of complaint that Abram Smith was incompetent at the time of the making of the deed. This claim is, however, not urged upon this appeal, and the arguments and carefully prepared briefs are directed to the claim made that the deed should be construed as a mortgage. In considering this contention of the complainant, it is well to have in mind the rules of law applicable thereto. In a recent case, *Crane* v. *Read*, 172 Mich. 642, at page 647 (138 N. W. 223), Mr. Justice STONE, speaking for the court, said:

"In this class of cases the proof ought to be sufficient to overcome the presumption that the instrument in question truly represents the transaction in its entirety. *Schmidt* v. *Barclay*, 161 Mich. 1 [125 N. W. 729, 20 Am. & Eng. Ann. Cas. 1194]."

Again, in *Dalton* v. *Mertz*, 173 Mich. 153, 157 (138 N. W. 1055), this court said:

"The proof should be clear and convincing before an instrument which, on its face, purports to be an absolute conveyance is declared to be a mere security."

See, also, *Sowles* v. *Wilcox*, 127 Mich. 166 (86 N. W. 689).

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The complainant called to the witness stand the defendant, Angus M. Smith, who stated that the sale of the farm was discussed by him with his father for several days, and also in the presence of his sisters, Mrs. Seaman and Mrs. Moore, and stated that he was to have the farm and the personal property on it for $24,000.

It appears that at the time of the execution of the deed Angus M. Smith gave his father a writing, in which he agreed in case he should sell the farm during the lifetime of his father to pay to his father all moneys he received over and above $24,000. Mrs. Moore and Mrs. Seaman, the daughters of the deceased, were also called by the complainant, and testified that the giving of the deed was the voluntary act of their father, and detailed conversations with him in which he expressed the desire that Angus should have the farm. Mrs. Seaman, being examined by complainant's solicitor, testified as follows:

"*Q.* Do you remember the circumstances of the signing of this deed by Abram Smith?

"*A.* I knew it was in connection with his own affairs and my brother's.

"*Q.* Do you remember now the circumstances surrounding the signing of it as a matter of memory?

"*A.* Yes, it was at home in the dining room. My father's desk was in the extreme end of part of the dining room.

"*Q.* Who was present?

"*A.* My daughter, Mrs. Johnson, Mrs. Moore, Mr. Robertson, and myself.

"*Q.* Mr. Robertson came there?

"*A.* He brought the deed there, as I remember it.

"*Q.* Do you remember whether or not before he brought the deed there you had any knowledge or information from any source that such a deed was to be given?

"*A.* I don't know; I don't remember.

"*Q.* Did you talk with your sister about it in any way?

"*A.* No.

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"Q. Or your father about it?
"A. No.
"Q. Was the deed prepared when Mr. Robertson brought it there?
"A. I think so.
"Q. All but the signing and acknowledging?
"A. Yes, sir.
"Q. And you saw your father sign it?
"A. Yes, it was read over to my father in my presence.
"Q. And you know it to be the deed of the farm?
"A. Yes, I did.
"Q. Was there anything said there about the three witnesses signing as witnesses?
"A. No, I have no recollection of it.
"Q. And you don't have any recollection of what was said before that as to why the deed was given?
"A. I know that it was my father's wish to give it. Of course, I knew that he attended to his own affairs, and knew what he was doing.
"Q. What was the purpose of giving it, as you understood it at the time?
"A. To make things a little easier for father, and to pay my brother his indebtedness.
"Q. To pay your brother his indebtedness, and make things easier for your father?
"A. Yes.
"Q. In what way would this make things easier for your father?
"A. He wouldn't have the worry of those mortgages that were hanging over the farm.
"Q. Wouldn't have the care of the farm?
"A. No.
"Q. Was that talked of at that time?
"A. I presume it must have been.
"Q. What was your father to get out of this?
"A. As I remember, in case my brother sold the farm during my father's lifetime he was to get anything over the $24,000, in case it was sold during father's lifetime.
"Q. Was it the understanding that Angus was to proceed and sell the farm?
"A. I don't think so; I don't remember that."

Both of these witnesses testified against their own

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interests, as they would profit together with complainant if the contention of the latter could be sustained. It is intimated that Mrs. Moore was acting in concert with Angus; but we are satisfied that the record does not warrant this claim.

Charles Stewart, a friend of Abram Smith, a man 77 years of age, testified concerning a conversation he had with him as follows:

"A year before he died, or 18 months, it may have been a year and a half, I wouldn't be certain about that, but he told me that he had sold the farm to Angus, deeded the farm to Angus. He says, 'I can't do any more up there, and Angus has done a great deal of work there,' he says, 'and I have let him have the farm.'"

John M. Robertson, who drew the instrument, testified as follows:

"*A.* Well, on that day, I think between 10 and 11 in the forenoon—I know it was the middle of the day; it wasn't evening anyway; my impression is it was the forenoon—Mr. Smith came into my office, and I was sitting there alone. He said: 'Mr. Robertson, I wish you would draw me a warranty deed of my farm to Angus M. Smith, and put in the consideration. I think it is $24,000; I hain't seen it since (examines deed); yes, $24,000;' and says, 'You know the description.' 'Yes,' I says, 'it is the north half of private claim 188.' 'Yes, you know the description,' he says; 'well, you make it right out.' I says, 'Yes, sir.' 'How long will it take you?' 'Oh, not very long.' 'Well, would you just as soon make it out, and bring it up to the house? I don't care to wait.' I said, 'Yes, sir.' 'Well, you will bring it right up?' 'Yes, sir.' 'All right, I will go up.' So there wasn't any other business and I went to my atlas that lays there on the safe, to be sure it was the north half of private claim 188, 320 acres of land. I made the deed out, and put my stamp there on it, because I didn't take that with me, 'Notary Public, St. Clair County, Michigan,' and date of commission. I took the deed up there, and went into the house and gave it to him, and he took it and looked it over. He either

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had his specks on or put them on and looked the deed over to see if the description was all right, and I told him I thought it was. He said, 'Yes.' He turned it over, and I think he says, 'Where do I sign?' And went to the desk in the dining room in the northeast corner, and I showed him, and after I did he signed his name. I took it then, and signed my name as a witness, and put my name here as notary, and I said to Mrs. Moore and Mrs. Seaman who were present—I think I brought the deed and put it on the dining room table—and I said, 'Come here, girls, and sign this deed; it takes two witnesses.' So Ella Moore signs her name to the deed, and Mrs. Seaman signs her name to the deed. When I saw Mrs. Seaman sign her name to the deed, I noticed then, and says I, 'That is three witnesses on the deed.' But I took it the reason for both signing was because I said, 'Come, girls, and sign this deed; it wants two witnesses on this deed,' and, they not being familiar with whether it took two or three or four, they both signed it. That was about two years before he died that I made the deed, as near as I can remember. I am not sure but Mr. Smith asked the other woman to sign; it seems to me something like that he asked her, that he said, 'Nellie, here you sign, too'—something like that."

Considerable effort was made to show irregularities in the books of the partnership of Angus and his father, and that mortgages which had been given by the father to Angus, and which entered into the consideration of the deed, were given without consideration. It would profit no one to attempt to go into the details of these alleged irregularities. That there were certain irregularities in the keeping of the accounts there can be no question; but upon the vital question in this case, which was one of fact, whether or not the deed in question was given as an absolute conveyance, it seems to us the complainant has completely failed to make out his case, and the proofs are convincing that by the deed of conveyance it was the intention of the father to convey an absolute title to

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his son. The claim is also made that the value of the farm at the time of the giving of the deed was largely in excess of the consideration named in the deed. Evidence was taken upon this question; but from the testimony of those witnesses we are satisfied that the consideration named was a fair value of the farm at that time. The complainant having failed to establish his case by sufficient proof, the bill was properly dismissed.

The decree of the trial court is affirmed, with costs.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ., concurred.

AMANTA *v.* MICHIGAN CENTRAL RAILROAD CO.

1. RAILROADS—CROSSING ACCIDENT—NEGLIGENCE.
   Evidence that plaintiff was struck by a locomotive at defendant's crossing, that he looked both ways, and, owing to smoke and darkness, was unable to see any train coming, that a freight had just passed on an adjacent track and a passenger train went by making considerable noise, smoke, etc., and plaintiff was unable to hear or see the approaching locomotive, which gave no signal and was running backwards without a headlight and with only small red and white lights displayed, sustained the trial court in refusing to direct a verdict for defendant.

2. SAME—CONTRIBUTORY NEGLIGENCE—DIRECTED VERDICT.
   It is proper to submit to the jury the question of plaintiff's contributory negligence, if candid and intelligent men might reach different conclusions upon the question, or the testimony is conflicting.

3. SAME—LIGHTS—WARNING.
   Nor did the court err in charging the jury that if the de-

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fendant operated its engine without lights after it was so dark as to obscure approaching objects, defendant was guilty of negligence.

4. SAME—APPEAL AND ERROR—SAVING QUESTIONS FOR REVIEW.
Having requested no instructions on the issue as to darkness, etc., defendant could not review the court's failure to charge as error.

5. SAME—EVIDENCE—CHARGE.
And evidence tending to show that an engine was seen near the place of injury shortly after the accident, running backwards without lights, was not incompetent, where the court instructed the jury not to consider the evidence unless they found that the engine was the one which injured plaintiff.

6. DAMAGES—HUMILIATION—SUFFERING.
It was not erroneous to permit the jury to determine what damages plaintiff should receive for future pain and suffering and mental anguish for the loss of an arm and a leg though no evidence other than his physical condition was offered on the subject.

Error to Kent; Brown, J. Submitted April 11, 1913. (Docket No. 49.) Decided October 1, 1913. Rehearing denied January 5, 1914.

Case by John Amanta against the Michigan Central Railroad Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Wilson & Wilson and *Kleinhans & Knappen (Henry Russel* and *Frank E. Robson,* of counsel), for appellant.

George E. Nichols and *E. F. Phelps,* for appellee.

KUHN, J. This action was brought to recover for personal injuries caused, as it is claimed, by the negligence of the defendant company. The plaintiff, who resided in the city of Grand Rapids, on the 7th day of October, 1910, was requested by a friend, named

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Frank Provenzo, to go with him to visit his sick daughter in St. Mary's Hospital in that city. They left the home of plaintiff on Fourth avenue about 6 o'clock in the evening. Plaintiff claims that they walked from Fourth avenue north on Hilton street to Third avenue, where they turned east, walking on the south sidewalk until they reached the system of railroad tracks which cross Third avenue, running north and south. The first track is a long Grand Rapids & Indiana side track; next east, and 11½ feet from this side track, is the Grand Rapids & Indiana main track. Eight and one-half feet east of this is the Michigan Central main track. Next east, and from 8 to 9 feet from the main track, is the Michigan Central side track. Still further east are the tracks of the Pere Marquette Railroad Company. It is the claim of plaintiff that when they reached the tracks it was dark and they were stopped by a freight train on the Grand Rapids & Indiana tracks coming from the south, and while waiting for this train to pass they crossed the street to the north side of Third avenue and stood on the walk until the train had passed. When they were ready to proceed, they saw a passenger train coming from the south on the Grand Rapids & Indiana main track and waited where they were until that train had passed. They then proceeded eastward until the plaintiff had reached a point about halfway between the Grand Rapids & Indiana main track and the Michigan Central main track, when he looked to the north and saw no train or locomotive coming from that direction and heard no bell or whistle; that he then looked to the south and then again to the north but heard and saw nothing to indicate the approach of a locomotive or train from either direction; that, believing themselves safe, they started to cross the main track of the Michigan Central Railroad; Provenzo being about two feet ahead of the plaintiff. As plaintiff stepped

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onto the track, he was struck by a Michigan Central engine, which had just left its train at the Union Station, about half a mile north of Third avenue, and which was backing on the main track to the roundhouse, which is about a half mile south of Third avenue. Provenzo crossed in time and avoided being hurt, but plaintiff was struck by the engine and his right arm was severed at the shoulder and his left leg above the knee.

The negligence relied upon by the plaintiff is that this engine was being backed over the crossing without any lights and without ringing any bell or giving other warning of its approach. The trial court submitted the case to the jury, and a verdict of $8,750 was rendered in favor of the plaintiff. Judgment being had thereon, the case is brought here by writ of error.

It is the claim of the defendant that the engine was properly lighted with a red light on the right side and a white light on the left side, although it is also claimed that it was light enough to see an approaching train without them, as the sun had set within an hour and a three-quarter moon was visible, and there was an electric light about 15 feet above the ground. It is further claimed that the engine was backing slowly, about 6 miles per hour, and that if plaintiff had done as he claims he did, under the conditions existing, he must have seen the engine. Defendant's counsel requested the court to direct a verdict in favor of defendant on the ground of contributory negligence, which was denied, and in defendant's requests to charge a similar instruction was requested. On a motion for a new trial this question was again raised, and also that the verdict was against the weight of the evidence and was unsupported by the evidence.

This brings us to the first question discussed in defendant's brief whether, under the undisputed facts

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in this case, the plaintiff was guilty of contributory negligence. It is urged that the verdict is predicated upon the finding of a physical impossibility and that therefore the testimony of the plaintiff and his companion that they looked and listened should be disregarded, as the physical facts show that they could not have done so; and the cases of *McCarthy* v. *Railway Co.*, 120 Mich. 400 (79 N. W. 631), *Strong* v. *Railway Co.*, 156 Mich. 66 (120 N. W. 683), and *Hamilton* v. *Railway*, 167 Mich. 5 (132 N. W. 453), are cited. It is conceded by plaintiff that, when a train is in plain view and it is impossible to stop and listen without seeing or hearing the train, testimony of the plaintiff that he did not hear or see the approaching train should be disregarded; but it is urged in the instant case, and it is supported by the testimony of witnesses, that at the time the accident happened the hour was dusk; that because of the passing of a long freight train and of the rushing of a passenger train the air was filled with dirt, smoke, and steam, and that because of the darkness, the dirt, smoke, and steam the plaintiff was unable to see the approaching locomotive running backward out of the darkness upon him without any lights on the rear end; that the noise of the other trains which had just passed made it impossible to hear the locomotive; and that under these facts the question of plaintiff's contributory negligence was properly submitted to the jury. Whether or not plaintiff observed that care which an ordinarily careful and prudent man would have exercised under all the circumstances was, it seems to us, a question for the jury.

The plaintiff and Provenzo testified that there were no lights on the engine and this is disputed by the trainmen. The engineer testified that he knew "the lights were properly lit as the hour was dark." Other witnesses testified that objects could be dis-

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tinguished at varying distances of a hundred feet or more.

The question of plaintiff's contributory negligence should be submitted to the jury when the testimony is conflicting or where candid and intelligent men might reach different conclusions upon the question. *Becker* v. *Railway Co.*, 121 Mich. 580 (80 N. W. 581); *Haines* v. *Railway Co.*, 129 Mich. 475 (89 N. W. 349); *Welch* v. *Railroad Co.*, 147 Mich. 207 (110 N. W. 1069). We cannot say that the case is so free from doubt as to warrant the conclusion that the plaintiff was guilty of contributory negligence as a matter of law.

The next point urged by the defendant is that the court in his charge assumed that it was dark at the time of the accident and erred in not submitting the degree of darkness to the jury. At the close of the proofs a colloquy took place between the court and counsel as follows:

"*The Court:* The defense admits if the lanterns were out or there were no lanterns on the rear end of this locomotive as it passed over this street in question, the defense would admit that it was negligence.

"*Mr. Charles Wilson:* No, your honor, we do not admit that, because we do not admit it was dark enough to require them.

"*The Court:* I say if it were dark at that time, if it were dark enough to have lights, then there would be no question but what you would admit the negligence if there were no lights.

"*Mr. Hugh Wilson:* Oh, yes, we will admit that. We haven't any hesitation about that.

"*The Court:* The question of light or dark is a question for the jury. If it was dark enough so it was necessary to have lights, so that lights would have been needed to have given a warning, then the defense admits that, if they did not have them, they were negligent, just as negligent as you want to make them. Then what would be the benefit of the testimony?

"*Mr. Charles Wilson:* I would not want to say

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that we admit we were just as negligent as they claim we were.

"*The Court:* I am just saying that for the purpose of the argument.

"*Mr. Charles Wilson:* I do not want that statement to be taken as our admission, your honor.

"*The Court:* No, but then, as I understand it, there would be no question in the claims, or the claims of the defense, that if it were dark then you would be negligent if you did not have lights.

"*Mr. Charles Wilson:* Let me state our position; it is this: If it was dark enough to require lights, and it should be found that there were no lights on the rear of the engine, that would be fact to go to the jury on the question of negligence. It would not be conclusive evidence.

"*The Court:* I do not mean a man could be standing there, looking at the engine, and be run over and claim damages just because there were no lights there.

"*Mr. Charles Wilson:* That would be a fact to go to the jury, as to whether we were negligent. That is the extent of our admission."

It is urged that the position of the defendant was made clear in this colloquy, and that therefore it was unnecessary to call further attention to that position by special requests to charge.

The court, in his charge, with reference to this phase of the case, said:

"The traveler has a right to rely upon the exercise of proper caution on the part of the railroad company through its employees. It is required to give warning of its approach, if in the nighttime, by necessary lights and other signals, and if it fails so to do it is negligent. The negligence of which it is claimed the defendant was guilty is that the engineer of the engine in question ran and drove the engine backwards in a southerly direction upon the main track of the defendant company, up to and across Third avenue, while it was dark and the air contained dirt, smoke, and steam, without giving any warning whatever of the approach of the engine and without ringing a bell, blowing a whistle, or displaying lights

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on the rear end or south end of the engine at the time of its approach to and upon Third avenue. The plaintiff claims that ordinary care for the protection of others required the man in charge of the locomotive, under the conditions as claimed by the plaintiff here, to give warning of its approach to and crossing of a public highway, such warning as I have before stated."

Again he said:

"I may say to you, however, that if you find that this locomotive was running backwards on the main track of the defendant, without lights on the rear of the tender, the south end going south, after it was dark enough to obscure the approaching locomotive, the defendant as a matter of law was negligent; and if you also find that the plaintiff stopped, looked, and listened, and used ordinary care and caution to detect danger and avoid injury, as he claims he did, then and in that case he is entitled to recover such damages as he has fairly shown you he has suffered."

It seems to us that this clearly outlined to the jury the facts which it was necessary for them to find in order to hold the defendant liable and was a proper statement of the law applicable to this case.

However, if more specific instruction was desired by the defendant, special request for such instruction should have been made and the failure to do so precludes defendant from assigning error. See *Pruner* v. *Railway*, 173 Mich. 146 (139 N. W. 48), and cases cited therein.

On the trial of the cause, several witnesses testified that an unlighted engine was seen standing south of Third avenue. A motion was made to strike out this testimony for the reason that there was no evidence to identify the engine which was seen with the engine which struck the plaintiff. The court, in his charge, with reference to this testimony, said:

"Some testimony has been offered by the plaintiff tending to show that an engine was seen south of

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Third avenue and north of Fourth avenue just after the accident, and that such engine had no lights upon it, head or rear lights. The plaintiff claims that this testimony goes to establish his claim that, at the time he was struck by the engine and injured, there were no lights upon the south end of the engine which struck him. Before you can consider the evidence as to an engine south of Third avenue having no lights upon it, which was not directly identified as being the engine in question, you must first determine, from the evidence in the case and all the facts and circumstances here shown, whether or not such engine was the same engine that injured the plaintiff. If it was not the same engine, then you will not consider the testimony regarding the lights or no lights on such engine; but, if you find from the testimony that it was the same engine, then you may consider this testimony as bearing upon the question of the presence or absence of lights on the south end of the engine at the time it struck the plaintiff."

There was conflict in the testimony as to exactly where the engine stopped after the accident. The engineer testified that as soon as the engine struck the plaintiff he stopped the engine within a few feet, and that the cab was immediately over the body when he stopped. This is contradicted by other witnesses, who came to the scene of the accident immediately after it happened, who said that the engine had gone 100 feet or more down the track and was not standing on the street. It seems to us that the court fully safeguarded the consideration of this testimony in charging the jury that, before they could consider this testimony, they must first find that the engine described by the witnesses was the engine that caused the accident.

Complaint is made as to the instruction to the jury with reference to the measure of damages. The extent of the plaintiff's injuries is not questioned, as the accident resulted in the loss of his right arm and his left leg. The plaintiff testified that he was 31

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years old on October 7, 1912, and was a married man; that at the time of the accident his average wages were from $20 to $25 per week. It is claimed that since the accident he has been practically unable to do any work. Mortality tables were introduced in evidence, and it appears that the expectancy of the plaintiff is 34 years and that the present worth of his earning capacity at $20 per week would be $20,384. It is urged that there is nothing in the record to show that he was suffering pain at the time of the trial or that there was any evidence to show that he was likely to suffer pain in the future as a result of the accident, as it was claimed that his wound was entirely healed. The court charged the jury on the question of damages as follows:

"You may determine what compensation he should receive for pain and suffering, and for the humiliation of his condition; this includes the plain and suffering that he has already undergone, the mental condition that he is in and may continue to be in, and the pain arising therefrom."

It is urged that there is no evidence of humiliation and of future suffering. The physical condition of the plaintiff is a complete answer to this claim and was sufficient evidence to warrant the charge as given.

We have examined the other assignments of error but find them without merit. The judgment is affirmed, with costs.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ., concurred.

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SYKES *v.* VILLAGE OF PORTLAND.

1. NEGLIGENCE—ELECTRICITY—PRECAUTIONS TO AVOID CONTACT—TELEGRAPHS AND TELEPHONES—PROXIMATE CAUSE.

Where defendant village constructed a lighting system, using heavily charged wires, dangerous to human life, and thereafter permitted a telephone company to erect poles and extend its wires in the streets, passing in one place over the wires of the village, and where it appeared that one of the poles of the telephone company was not properly guyed up or braced, so that wires sagged and came in dangerous proximity to the wires of the lighting plant at the place of crossing, and there was evidence tending to show defective or insufficient insulation, resulting in the burning off of a wire, and the death of a child who came in contact with it, the question of the negligence of defendant village was properly left to the jury. It could not be determined as a question of law that, because the wires of the village lighting plant were first in place, the negligence of the telephone company was the proximate cause of the injury.

2. SAME—MUNICIPAL CORPORATIONS—GOVERNMENTAL FUNCTIONS.

A municipality is not relieved of liability for negligence, in constructing or maintaining an electric light plant used for commercial purposes, on the ground that its business relates to governmental functions. When a dangerous condition becomes apparent, the officials in charge of the lighting system are charged with the duty of removing the danger, if possible, and stand in no different situation than do employees of a private corporation.[1]

[1] On the question of municipal liability for injury to, or death of, traveler from electricity carried by wires strung along highway, see note in 22 L. R. A. (N. S.) 1176. And as to municipal liability for injuries by electric wires and appliances, generally, see note in 20 L. R. A. (N. S.) 648.

The question of liability for injury or death of traveler coming in contact with electric wire in highway, generally, is discussed in notes in 31 L. R. A. 566 and 22 L. R. A. (N. S.) 1169.

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3. EVIDENCE—IDENTIFICATION.
Evidence tending to show that a witness cut off one end of the broken wire and took it to the office of the electric light company, that another witness was there, saw it, and the exhibit looked like the end of the piece, as he testified, that another witness cut off the small piece offered in evidence, and had been informed that the wire was the broken wire in question, warranted the court in receiving the exhibit as evidence.

4. SAME—OTHER SIMILAR WIRE.
It was not error to receive in evidence a piece of wire that ran parallel to the broken section, showing similar defects to those claimed to have existed in the insulation of the fallen section of wire.

5. APPEAL AND ERROR—MORTALITY TABLES AS EVIDENCE.
Technical errors in the admission of evidence and in charging the jury, not shown to be prejudicial, *held*, not reversible, the judgment being small.

Error to Ionia; Davis, J. Submitted April 15, 1913. (Docket No. 64.) Decided October 1, 1913.

Case by John Sykes as administrator of the estate of John Sykes, Jr., deceased, against the village of Portland and Citizens' Telephone Company for the wrongful killing of intestate. Judgment for plaintiff. Defendants bring error. Affirmed.

Thomas E. Barkworth, William J. Stuart, and *R. A. Hawley,* for appellants.

Ellis & Ellis and *Scully & Davis,* for appellee.

KUHN, J. This is an appeal from a judgment recovered by the appellee, as administrator of the estate of John Sykes, Jr., deceased, against the appellants, the village of Portland and the Citizens' Telephone Company, for wrongfully causing the death of his son, said John Sykes, Jr.

The defendant the village of Portland has since 1896 maintained and operated an electric lighting

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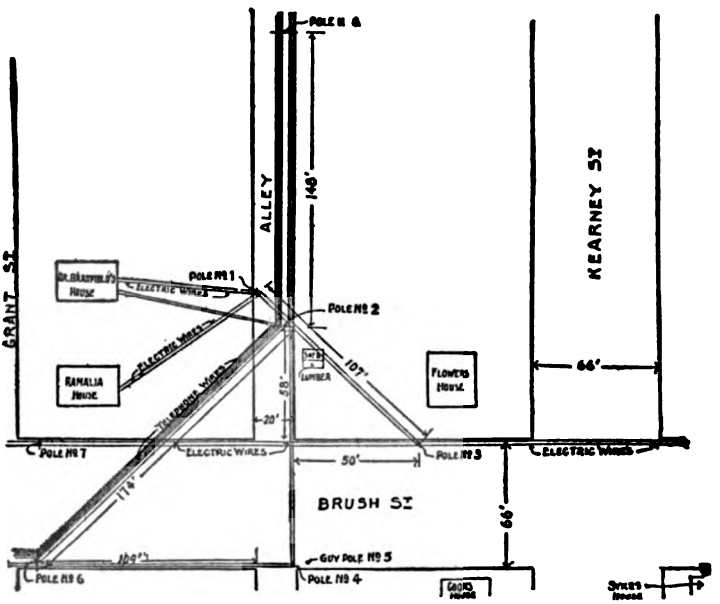
plant, which is used both for municipal lighting and for furnishing light to private consumers. Prior to 1902 it had erected its wires along Brush street, an east and west street in said village. Crossing Brush street at substantially right angles are Kearney and Grant streets, and midway between these streets an alley runs north from Brush street. In 1902 a franchise was granted the Citizens' Telephone Company



to erect its poles and maintain them with necessary equipment for an electric telephone system. A line of poles was placed on the alley running north and south, and wires were also stretched diagonally across Brush street and to a point in the alley about 58 feet north of the north line of Brush street. The relative situation of the poles and wires at the time of the accident which gave rise to this litigation is shown by the annexed plat, which is admitted to be approximately correct.

About 50 feet from the east line of the alley, on

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the north side of Brush street, the village had a pole from which electric light wires were extended to a pole on the west side of the alley about 79 feet north of the north line of Brush street. This pole, designated as "Pole No. 1" on the plat, contained a transformer. Across the alley and a little south from this pole was a pole of the telephone company, designated as "Pole No. 2" on the plat. The electric light wires were stretched underneath the telephone wires.

On the 21st day of April, 1909, plaintiff's decedent, a boy between nine and ten years of age, while passing along Brush street came in contact with one of the electric light wires which had become severed at a point about 10 or 15 feet from pole No. 1. No one saw the accident, but it is conceded that the contact caused his death. The short end of the broken electric light wire hung down from the transformer pole, and the long end had been carried by the wind or the recoil of the wire over the other electric light wire, which still remained intact, and had slid down this wire toward the street. When found, it extended across the worn path used as a walk to the electric light pole on Brush street near the house of a Mr. Flowers, being designated on the plat as "Pole No. 3." The body of the boy was found in the path about six feet from this pole. The wires of the village carried about 2,000 volts of electricity and were of copper with ordinary cotton insulation. The telephone wires were uninsulated and carried only a small quantity of electricity. The telephone pole on the east side of the alley at the time of the accident was leaning from the perpendicular to the west several feet, and no guy wires or support of any kind had been placed to maintain it perpendicular. According to the reports of the weather bureau, a strong wind had been blowing during the day, and at 4 o'clock in the afternoon, which is, at least approximately, the time of the accident, it was blowing

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not to exceed 35 miles an hour, and there was a space of about 14 inches between the two sets of wires. It also appeared that about a year before this accident, at the point where these wires crossed in the alley, the electric light wires and telephone wires came into contact and burned off two inside telephone wires.

An employee of the Citizens' Company testified that, when the wires came together the year before, the insulation on the electric light wires was "roughed up in two places," and that so far as he knew they were never taped again until the accident happened.

At the time of the trial the remaining electric light wire, which had not been removed at the time of the accident, was taken down and its insulation was discovered to be frayed at the places underneath the wires of the telephone company above it.

The declaration alleges that the immediate cause of the wires being down was as follows:

"That afterwards, to wit, on the 21st day of April, 1909, while said poles of the Citizens' Telephone Company were so insecurely fastened and were without support or guy wires or otherwise, and when its uninsulated wires were sagging and in close proximity to the highly charged, poorly insulated electrical wires of the village of Portland, and when no guards of any kind had been provided by either of the said defendants to keep said wires from coming in contact with each other, and when the said wires of the village of Portland so uninsulated and heavily charged with electricity were running diagonally across said alley west of the property owned by the said Flowers in the village of Portland, close to and underneath the wires of the Citizens' Telephone Company, and while a strong wind was blowing, causing the said corner pole of the said Citizens' Telephone Company to sway and its wires to sag and strike said heavily charged electrical wires of the village of Portland where its wires were uninsulated and where they crossed said alley between Kearney and Grant streets at a point north of Brush street, and by reason of said contact or the weakness of the said heavily

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charged electrical wires of the village of Portland, caused by previous contact with the said Citizens' Telephone Company's wires, one of said highly charged wires of the village of Portland burnt off, or broke off, and fell to the ground, and by reason of such falling hung from the aforesaid pole of the village of Portland standing on Brush street, to which one end of said wire was joined to the pole, and the free, broken end extended across a portion of the street, the part of the street used as a sidewalk, and across the path of pedestrians who walked along the north side of Brush street."

The grounds of negligence alleged by the plaintiff are concisely stated in the brief of counsel for the defendant village of Portland as follows:

"So far as the village of Portland is concerned, negligence is averred in that the village in its authority to the Citizens' Telephone Company through the ordinance neglected to provide reasonable safeguards and to require the company to so construct and maintain its poles and wires and crossarms that in case of storm or accident its wires might not by sagging or otherwise come in contact with the heavily charged primary wires of the village; further, that the village did not cause its switchboard and contributing office to be so arranged that notice would be given to the men in the office of the condition of the wires, and did not keep a man constantly in attendance to look after and attend such wires, and that the village left its heavily charged wires in proximity and where they would be liable to, and did in fact, come in contact with the wires of the telephone company; that it further carelessly and negligently omitted, when it permitted the Citizens' Telephone Company to run its lines along said alley, to place a pole on Brush street west of said alley and run the two wires north from that point and avoid crossing the wires of the said defendants; and further that the village knowing that the wires of the Citizens' Telephone Company were strung and left within a few inches of its highly charged wires, were in such close proximity that in case of rain, sleet, or wind, or sagging, such wires would in all human probability come together, and would either burn off the wires

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of the Citizens' Telephone Company or its own wires, and well knowing that there was no support to the corner pole of the Citizens' Telephone Company, by guy wires or otherwise, and that no span pole had been erected, and that the Citizens' Telephone Company had not in any manner insulated its wires, and well knowing that the insulation of the wires of the village of Portland was broken, and poor, did not provide any span pole to keep the wires apart, or insulate its wires, or take any precaution to keep said wires from coming in contact, and did not set any pole west of said alley, and did not put its transformer on the street line, but left for a long time, to wit, for a year and over prior to the 21st day of April, 1909, said wires in said alley unprotected and in the careless condition described. And, further that it did not, when it permitted the Citizens' Telephone Company to erect and maintain its wires, provide or adopt the usual appliances or methods to prevent contact between said wires or use any device to prevent contact, but on the contrary allowed and sanctioned the construction of the lines of the telephone company, and did not itself provide any protection for its wires and did not insulate its wires, but on the contrary, for a long time after the wires of the Citizens' Telephone Company came in contact with the heavily charged wires of the village of Portland, and by reason of the contact burnt off and destroyed the insulation and weakened the said wires so that they were not strong and good, said village of Portland carelessly and negligently neglected to protect its wires or provide new wires for the wires so injured; and said village of Portland continued to allow and permit the wires of the Citizens' Telephone Company to remain within less than one foot, to wit, between four and six inches, from its heavily charged electrical wires, well knowing that in case of a storm or wind said wires would come in contact and one or the other of said wires would burn off and fall to the ground. It further alleges want of inspection by the village of Portland and the consequent failure to discover and remove the defects and weakness caused by reason of the contact of its wires with the wires of the Citizens' Telephone Company, and that the village did not maintain its wires so they would not fall and

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interfere with the safe use of the highway. It further charges the village of Portland with fault in not keeping its wires insulated, and that in the construction of its plant it did not arrange for its transformers to be placed on the poles of its main lines so that highly charged wires would not be needlessly run across private property, and with neglecting to have a transformer on its pole in the street and have the electric current reduced before it went through private property or across streets, sidewalks, or alleys."

The plaintiff did not urge all of the averments of negligence above set forth, but, for the most part, they were submitted to the jury by the trial judge.

The village of Portland now urges that the court did not properly submit to the jury the question of proximate cause. It is claimed that they were first on the ground and that their poles and wires were in position when the franchise was given to the telephone company, and that, if any negligence was shown which resulted in the death of plaintiff's decedent, it was the negligence of the Citizens' Telephone Company and not that of the village. The plaintiff claims that after both lines were constructed, crossing each other, a duty developed upon each party to see that these lines did not come together and burn off and fall to the ground, and that one of the defendants could not excuse itself because it was on the ground first.

There does not seem to be any question that the telephone pole had been leaning over into the alley, bringing the wires into close proximity, so that they were not more than 14 inches apart, which experts testified was dangerous proximity. It is claimed that a reasonable inspection would have discovered this condition, and ordinary prudence would have caused both defendants to have taken proper precautions to prevent accidents by straightening the telephone pole, or replacing the insulation on the highly charged

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electric wires, or taking other precautions to prevent the wires from coming together.

Whether these defendants acted as an ordinarily prudent man would have acted under the circumstances was properly submitted to the jury. It must be said that this accident was the result of concurring causes, the removal of any of which would have prevented the accident.

The question of proximate cause arose in the case of *Warren* v. *Railway Co.*, 141 Mich. 298, at page 302 (104 N. W. 613). The court said:

"In this connection it is urged that the proximate cause of the injury was not the want of insulation, nor the failure to guard the span wire, but it was the breaking of the tree. It is generally the case that an accident is the result of concurring causes. If the rain and snow never fell and the wind never blew, wires would be less likely to fall and break. In this case the span wire was hot where it was not intended to be. The telephone wire was pressed upon it when it was not so intended. The wire burned in two from the intense heat taken on from the span wire, and the ends fell. All of these were things to be anticipated and guarded against. If this was not done to the extent that a prudent man would do it, there was a failure of duty, which might be a concurring cause of the accident, making defendant liable. Thus we held that, where a horse was caused to struggle and injure his master through getting his foot through a hole in a bridge, the defect in the bridge was a proximate cause of the accident."

In addition to the authorities cited in that opinion, see, also, *Electric Railway Co.* v. *Shelton*, 89 Tenn. 423 (14 S. W. 863, 24 Am. St. Rep. 614); *Fox* v. *Village of Manchester*, 183 N. Y. 141 (75 N. E. 1116, 2 L. R. A. [N. S.] 474); *Cumberland Telephone & Telegraph Co.* v. *Ware's Adm'x*, 115 Ky. 581 (74 S. W. 289).

Exception is taken by the counsel for the village of Portland to the following request to charge, which was given:

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"*Fifth.* It is claimed by the village of Portland when it erected its wires and poles that the construction at that time was correct, and that if any liability attaches it is from the fact that the Citizens' Telephone Company, when erecting its own poles and constructing its wires, found the defendant village already in position under legal authority, and upon it was imposed the duty of doing everything that would be necessary for the protection of life and property; that it should have constructed its wires in some other way or put proper guy wires to its poles and used a guard wire or some other instrumentality to keep its wires from coming in contact with the wires of the village. It is true that it was the duty of the Citizens' Telephone Company, when it erected its poles and put up its wires, to use all necessary precaution to keep the wires from coming in contact with the highly charged wires of the village of Portland, but it does not by any means follow as a legal consequence that the existence of that duty relieves the defendant the village of Portland from its own duty in the premises. If it knew that these wires were in close proximity to each other, or that the poles of the Citizens' Telephone Company were sagging and bringing its wires in closer proximity, it should have taken steps to relieve the situation from danger and not have remained inactive simply because some other company had come to have a legal obligation to the public imposed upon it. If, after the village of Portland, defendant, placed its poles and constructed its wires, new facts or conditions arose making, in view of them, its first construction dangerous to the public, then it was their duty to have acted and so arranged their wires as to have rendered it improbable of contact at a point where it would be dangerous if it remained. If the situation was such as would have enabled the village of Portland to have forced by request or otherwise the Citizens' Telephone Company to remedy the evil, then it was the duty of the village to make such request and see that the evil was remedied. If it failed of success in that regard, it should have applied some proper remedy itself."

It is contended that this gave the jury the right to

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find the village guilty of negligence in the case at bar because of the nonaction or improper action of its legislative branch. While there are averments in the declaration on which such a claim might be based, no such claim was made by plaintiff's counsel on the trial, and this was admitted and repeatedly stated in the presence of the jury. The only duty urged by plaintiff devolving upon the defendant village is the same duty devolving upon any private corporation running an electric light plant in a city or village. This electric light plant was erected for commercial purposes, and, as this court held in *Hodgins* v. *Bay City*, 156 Mich. 687 (121 N. W. 274, 132 Am. St. Rep. 546), the village is not relieved from liability for the neglect of its employees on the theory that the business relates to local governmental functions. See, also, *Brantman* v. *City of Canby*, 119 Minn. 396 (138 N. W. 671).

When a dangerous condition became apparent, it was the duty of the village officers in charge of the plant, if possible, to remove the danger, and, if the situation was caused by the telephone company, it was the duty of the village officers and employees to request them to remove it. In this regard it seems to us they occupy no different position than the officers and employees of a private corporation would occupy under similar circumstances. The requests to charge given by the court with reference thereto were proper.

Upon the trial a short piece of wire was introduced in evidence identified as Exhibit 4, and it was claimed that it was cut from the loose wire which hung down from the transformer pole No. 1 on the day of the accident. It is urged that it was error to admit this exhibit in evidence, as it was not sufficiently identified. Witness Teachout, who had been in the employ of the village shortly before the accident and also in the employ of the telephone com-

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pany, but at the time of the trial was working for the telephone company, testified that on the afternoon of the accident he took both ends of the broken wire down from one pole to the other and took them to the offices of the Electric Light Company, and said he thought witness Knox was in the office when he left it there. Witness Knox testified that he was in the office when Teachout brought the wire in and assisted in making measurements from the transformer pole to the telephone wires, and stated that the distance was about the same as the length of the short wire brought in by Teachout, and, while he would not be positive, said that Exhibit 4 looked like the end of the small wire brought in by Teachout. Witness Jenkins, who was in the employ of the village in the electric light business, testified with reference to this exhibit as follows:

"Yes, sir; I saw the wire from which this (Exhibit 4) was taken from; cut it off myself from the piece; couldn't tell just exactly how long a piece it was; should judge 7 or 8 feet long. That piece of wire was brought to the office by Teachout and Knox and it was cut off by me; it was then in the same condition which it is now. I have measured the distance from pole No. 1 to pole No. 2. The distance between the poles, center of the butt to each pole, is 24 feet and 6 inches, I think; made figures of that last night. Pole No. 1 from the ground to the top is 25 feet and 5 inches; from the top of the pole to the crossarm is 8 inches and a half."

On cross-examination he admitted he was not in the office at the time Teachout came in with the wire but relied upon what was told him. It appears that it was his duty to look after the wires, and it does not appear that there were any other wires in the office that were connected with the transaction. Counsel for the village admitted that Exhibit 4 was the end of the wire which hung from the transformer pole. This chain of evidence and circumstances were strong

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enough to warrant the jury in believing that Exhibit 4 was, what it was claimed to be, a part of the broken wire which caused the death of plaintiff's decedent.

Objection is also made to the reception of Exhibit 14, which was a piece of wire taken from the companion wire of the one that was broken. This wire remained in position at the time of and after the injury in question and continued to remain in use until near the close of the trial, when it was removed, under the direction of the village authorities, brought to court, and received in evidence. Its purpose was to show that there were also marks or rough places on the upper part of the insulation of this wire at the point where the telephone wires crossed. The evidence shows conclusively that the wire was the identical wire that ran parallel with the wire that burned off on the day of the accident, and that it had been kept in such a condition that injury had not been done to it since that time, until it was taken out and offered in evidence. Under these circumstances it was not error to allow the jury to consider it with all the other evidence in the case.

Our attention is called by the plaintiff to the fact that the defendants in this case sued out a joint writ of error but filed no joint errors, and that the Citizens' Telephone Company complains of error committed by its codefendant. It is urged that these assignments of error relied upon by the telephone company should not be considered on this appeal. They relate to the admission of evidence; and, as we find that no error was committed, it is unnecessary to pass on that question.

The remaining assignments of error have been considered. The charge of the court was comprehensive and clear and the case was fairly submitted to the jury.

Complaint is made of the admission of the mortality tables in evidence and the instruction of the court

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with reference to damages. Considering the amount of the judgment, $1,200, if technical errors were committed we are not prepared to say that they were sufficiently prejudicial to warrant a reversal of the case.

Judgment is affirmed.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ., concurred.

APPENZELLER v. APPENZELLER.

FRAUD—DEEDS—EXECUTION.

Evidence *held*, to be insufficient to sustain the burden of proof resting on complainant, who claimed that her son and his attorney had procured the execution of a deed of her property by fraud.

Appeal from Saginaw; Gage, J. Submitted April 21, 1913. (Docket No. 97.) Decided October 1, 1913.

Bill by Leah Appenzeller against William H. Appenzeller and wife for the cancellation of certain deeds. From a decree for defendants, complainant appeals. Affirmed.

Riley L. Crane, for complainant.

Snow & Snow, for defendants.

KUHN, J. In this proceeding it is sought to set aside a deed given by complainant to the defendant William H. Appenzeller and his two sisters. The

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father, Frederick Appenzeller, died in Saginaw on September 29, 1909. He had been in the mercantile business in different places, and the property covered by the deed in question, of the value of about $50,000, was the result of the earnings and savings of himself and his wife. The title of the property had been taken in the wife's name for reasons not disclosed by the record. The defendant William H. Appenzeller, at the time of the death of his father, was residing in the city of Seattle, Wash., where he was engaged in the shoe business. The father being stricken with paralysis, the son was summoned by telegram and arrived in Saginaw about a month before his father's death and remained until about a week after and then returned to Seattle to dispose and arrange his property matters so that he could come back to Saginaw to remain permanently. It is his claim that after his father's death he talked over the property matters with his mother, and that she suggested that he look after the collection of the rents, and that she was desirous of placing the property in her children's names. He thereupon consulted an attorney, who advised him that a deed might be drawn to the three children reserving a life estate to the mother. He claims to have informed his mother of this, but she objected to the attorney who had been suggested and proposed that he see Mr. Frank Emerick, an attorney who had done some business for the father during his lifetime, and request him to draw the deed. This was done and a deed was prepared, and on the evening of October 11, 1909, by arrangement, Mr. Emerick took the deed to the home of complainant and in the presence of her daughter Daisy, her son, the defendant William, and the attorney, Mr. Emerick, she executed a deed by which she deeded practically all the property to the three children, reserving to herself a life estate "for and during her natural life, together with the possession and

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control thereof and all the rents, issues, and profits thereof."

The testimony of the complainant and her daughter Daisy is in sharp conflict with the testimony of the son and Mr. Emerick as to what occurred at the house. It is the claim of complainant that as her other daughter, Lulu, was very ill at Lake Geneva, Wis., they were making preparations to leave Saginaw on the morning of the 12th of October to visit that daughter, and they did leave on that day and were accompanied by her son, who went on to Seattle after remaining a day or two at Lake Geneva. She claims that the first she heard about Mr. Emerick coming to the house was when her son on the evening before leaving at about 7 o'clock, came to the kitchen where she and her daughter were washing dishes and said, "Hurry up, Mr. Emerick is coming up this evening to see about collecting the rents while we are away;" that when Mr. Emerick arrived there was no talk of a deed or transfer of property; and the typewritten deed was folded and only party opened, and that it was not read to her, and that she supposed that she was signing a paper with reference to the rents only. She testified:

"He came in at 8 o'clock and he had a paper in his pocket, and he was pretty much in a hurry, and he said, 'Mrs. Appenzeller, I want you to put your name down on this paper; sign it.' He read a little but not very much of it. He said, 'Each child should share and share alike.' So I thought it was the rents, nothing but a lease; and that was all he read; and he says, 'Now it isn't necessary to read anything else.' He said: 'It is all right, Mrs. Appenzeller. Put your name right down here.' He never asked me to read it at all, and I didn't think there was anything else only— * * *

"*Q.* Then your understanding of this paper was that he was to collect the rents on your husband's estate and give them equally to the three children?

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"*A.* No, my share would come out of that.

"*Q.* Well, I thought you said Mr. Emerick told you it was to deed it to your three children, share and share alike?

"*A.* Share and share alike, he fixed this.

"*Q.* I say, that is what you say you have understood that the rents were to go to the children, share and share alike? You thought he meant rent from the estate of your husband, is that right?

"*A.* Rents from the estate.

"*Q.* Well, now, you said that he read a portion of it to you?

"*A.* Yes, sir. He told me share and share alike. When he said share and share alike, I thought he meant the children, of course. I have done considerable business during my lifetime and understand it. I have seen deeds of property and signed many of them. I have sold property of my own and signed deeds for it."

In this she was corroborated by her daughter Daisy. The defendant testified to an entirely different version of the transaction, and said that his mother fully understood the arrangement for deeding the property before Mr. Emerick arrived, and the deed was read to her, and that an hour was spent in discussing and explaining its details.

Mr. Emerick testified as follows:

"*Q.* How did you happen to draw that deed, Mr. Emerick?

"*A.* Mr. Wm. Appenzeller came to the office and informed me that there had been some family conferences in regard to the disposition of the property or arrangement of the property; that he consulted Mr. W. E. Crane, and his mother objected to him and desired to have her own attorney, which was myself, to prepare this deed and look after the business; and he said to me, after conferring together, 'She desired to have the conveyance in such shape as to retain the property during her life, and after her death to be divided among the children.' I drew the deed in accordance with those instructions and suggestions.

"*Q.* Will you state to the court what took place at the time this deed was signed by Mrs. Appenzeller?

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"*A.* Well, after preparing the deed, I took it to my residence on Michigan avenue about a couple of blocks, I think, from where they resided, and then in the evening I walked down there, and when I came to the house the three were in the sitting room. We all sat about the table in the sitting room; and I remember I introduced the subject and took the deed from my pocket, and there was some conversation before the pen and ink was procured, and I read the paper over carefully and I explained it repeatedly to Mrs. Appenzeller, in the presence of her daughter and her son, that the paper was drawn so as to carefully protect her life estate and her property interests in the property during her life, and all the income, and so forth, and then at her death to be equally divided among the three children. I was very careful about the matter, I remember, and finally after reading this paper, and after the discussion about it and the explanation of it, it was signed and I took the acknowledgment of Mrs. Appenzeller and signed it also as a witness. The deed was signed upon the table in the sitting room and I put it in my pocket. Then there was quite a little talk about the matters pertaining to the administration of the estate; and the young lady went out somewhere from the room and brought back a box containing papers, and I stepped around on the other side of the table, and when I saw what they were I examined some of the papers, spoke about the probate of the will or whether there was or not a will. Then I think I stated to the son, who apparently had charge of matters, to fix a time he could bring all these papers to my office and I would go through them carefully and see what there was to it. It was arranged that I should take charge of the legal part of the administration of the estate, and there was some other talk about the work here. The paper was spread out at large upon the table, read over, and signed by her. From the fact it was a woman, and it has been my invariable custom to be careful about that, I will say that was my purpose.

"*Q.* At that time, was there anything said about collecting rents?

"*A.* Nothing about that subject that I can recollect at all. Nothing said about my collecting rents.

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There was some talk about the estate matters and of probably finding a will."

On cross-examination:

"I have been a lawyer for 30 years. Did some business for Mr. Appenzeller, deceased. He was in the habit of coming to my office at times in consultation in regard to his various properties; sometimes had trouble with his tenants; and I prepared some leases for him. One piece of property he had on Genesee avenue of which I had an abstract made and examined the title. He was in the habit of coming to my office quite frequently. I knew Mrs. Appenzeller quite well. I once bought a piece of property from them and she came to my office some two years ago. A short time after his death, I think before the parties went West, I think some of the papers pertaining to the estate were left at my office, or brought there, before they went away. I was employed as attorney for the estate within ten days after his death and before they went West. I talked with Mrs. Appenzeller about acting for the estate prior to their going West. I think it was the same day, that evening after the execution of the deed. We examined the papers that night. We were looking for the will that night among those old papers. The first business I had done for the son here was in this case appearing as his solicitor. The son gave me the information. I didn't see any one else about the deed prior to going to the house.

"*Q.* And you hadn't done any business for her?

"*A.* Well, I don't know as I did as her attorney. I did for her husband. For several years before his death and during his sickness and after his death, I was attorney for the family. If she had occasion to consult any one she consulted me following her husband's sickness and death. The description of the property in the deed was from papers that the son brought to my office. The deed included all her property. It was the intention to include everything. I went to her house about 7:30. She, her daughter and son, and myself were the only persons there.

"*Q.* You say you read that deed over to her?

"*A.* Surely, I read it all. I read some portions more than once and the entire paper carefully once.

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"*Q.* So the daughter and widow are entirely mistaken when they say that paper was not read?

"*A.* Entirely mistaken. I am absolutely sure. I wouldn't have a woman sign a paper without carefully reading it.

"*Q.* What did she say to you about it?

"*A.* I couldn't assume to give the exact language, but I know I went in and sat down and took the deed from my pocket. Mrs. Appenzeller sat near me, the daughter across the table, and the son near by somewhere; and after some ordinary conversation I produced this deed and laid it upon the table, and I called attention to it and said it was a deed I had drawn according to the information I had and what I thought she wanted, and I read the paper. Then I carefully explained the legal effect and nature of the instrument, particularly as to her retention of the life estate during her life, and the right to the reception by her of all rents and incomes during her life, and after her death to go to the three children.

"*Q.* You don't remember anything that she said about it?

"*A.* Well, I wouldn't attempt to quote her exact language. I know she made the response there when I spoke to her and that she was satisfied.

"*Q.* Wouldn't it strike you as a little peculiar that a woman deeding away all the property she owned, that she didn't say something about it?

"*A.* Why, she did say something. She talked. I couldn't repeat the exact words she used. It seemed to be perfectly understood and she signed it readily. I saw nothing peculiar in the transaction in her deeding the property to her own children and reserving a life estate. I thought it was a very equitable adjustment of her property rights. I couldn't think of anything possibly better for her. I had the paper all ready for her signature when I went there.

"*Q.* Was there anything said there about your collecting rents for her or for the estate?

"*A.* I can't recall a single word on that subject. I think the rent matter came up after she came back. The first I recall about the rent matter was trouble with a tenant in one of the stores. I never collected rents except where there was trouble. I wouldn't bother with it. She collected her own rents."

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It also appears that about a year after the execution of this deed the complainant executed a will drawn by Mr. Emerick, by which she gave to her two daughters all such property as she still possessed, and especially referred to the deed in the following language:

"My son, William H. Appenzeller has already received by virtue of a deed executed by me and recorded in the register's office of Saginaw county, Michigan, an undivided one-third of my real estate described in said deed and such interest taken by him under said deed shall be in full of his distributive share and of all share of my estate."

With reference to the reason for drawing this will, there is again a decided conflict in the evidence. The complainant alleges that the will was drawn at the suggestion of Mr. Emerick and testified:

"*Q.* You knew what this will contained, didn't you? There was no mistake about that in your mind?

"*A.* Well, wasn't so much my knowledge. I never made a will before.

"*Q.* Well, you understood what this contained?

"*A.* Yes, sir.

"*Q.* This was read to you?

"*A.* Yes, the will was read to me. I knew what was in it.

"*Q.* So you knew when this clause, 'My son, William Appenzeller has already received by virtue of a deed, executed by me, and recorded in the register of deed's office, Saginaw county, Michigan, an undivided one-third of my real estate, described in said deed, and such interest taken by him in such deed, shall be in full of his distributive share, and of all share in my estate'—when that was read to you, you knew you had deeded to him some property, didn't you?

"*A.* No, sir; I didn't.

"*Q.* You didn't know that? What did you think that meant, those words in clause 3 of the will?

"*A.* I didn't know what it meant.

"*Q.* Why, Mrs. Appenzeller, the reason that you divided this property, all you might have, which consisted of real and personal property, jewelry, etc.,

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when you devised that to your two daughters you knew that you had disposed of the rest of your property to your three children, didn't you, equally, share and share alike, and you said so right in that will?

"*A.* Mr. Emerick proposed that himself.

"*Q.* Do you mean to tell this court that when you signed that will, recognizing that deed, you didn't know then that you had executed the deed to your three children?

"*A.* No, I didn't know that I deeded it at all.

"*Q.* Well, what did you think that clause 3 meant?

"*A.* Didn't know what it meant.

"*Q.* What did you think it meant then?

"*A.* I don't know.

"*Q.* Didn't you think about it?

"*A.* I don't know."

Complainant further claims that she made frequent inquiries of Mr. Emerick concerning the instrument executed at her home but that he refused to give her the information she wanted and that it was not until her brother, who did not reside in Saginaw, came that she discovered that the instrument executed on October 11, 1909, was in fact a deed, and immediately thereafter this proceeding was instituted. It further appears that Mr. Emerick never attempted to collect any rents except in one or two instances when he collected some small sums on account of difficulties which she had with her tenants, and this was after her return from Lake Geneva, where it appears she only expected to remain two or three weeks. It does not appear that Mr. Emerick had ever acted as attorney for William Appenzeller before the drawing of the deed, and there is nothing in the record to indicate that William Appenzeller knew anything about the execution of the will until this suit was begun and Mr. Emerick informed him about it. To sustain complainant's contention in this case, it would be necessary to find that Mr. Emerick was guilty of most reprehensible conduct as an attorney and that he entered into a conspiracy with the

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defendant William Appenzeller deliberately to deceive the complainant as to the character of the instrument executed on October 11th and, to carry out the fraud, had her execute the will and deliberately deceived her as to its contents. The proofs are not sufficient to warrant such a finding. It appears that he has been a practicing attorney for 30 years, had been prosecuting attorney of his county, and at the time of the hearing of the case was vice president of the board of education of the city of Saginaw.

The trial judge, who saw and heard the witnesses on the stand, made the following findings as to the credibility of the witnesses:

"From the entire evidence I cannot say that Mr. Emerick and the defendant are not quite as worthy of credence in this matter as the mother and the daughter. If it occurred as the mother and daughter claim it did, then the defendant and Mr. Emerick were parties to a conspiracy to procure this deed from the complainant by fraud and deceit. To establish a case of fraud the proofs must be clear and convincing as our court has said many times. Certainly no one who heard this evidence could say that any fraud or deceit was established by such proof."

A careful reading of this record convinces us that the proofs were wholly inadequate to make out the fraud relied upon, and the chancellor properly dismissed the bill.

The decree of the lower court is affirmed, with costs.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ., concurred.

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STEWART v. TERWILLIGER.

1. SET-OFF AND COUNTERCLAIM—PARTNERSHIP—JOINT LIABILITY.
The liability of partners on a firm obligation is joint, not several, and in an action by one of the partners, the defendant may not set off against plaintiff's demand a debt due him individually from the copartners.

2. SAME—DEEDS—COVENANTS.
Covenants of title in a deed executed by copartners to a third person, and not referring to any partnership relation, are joint, not several.

Error to Wayne; Mandell, J. Submitted April 22, 1913. (Docket No. 108.) Decided October 1, 1913.

Assumpsit in justice's court by S. Wightman Stewart against Francis Terwilliger for broker's commissions. Plaintiff appealed to the circuit court from a judgment for defendant. Judgment for defendant. Plaintiff brings error. Reversed and judgment for plaintiff entered.

S. W. Stewart (Choate, Robertson & Lehmann, of counsel), for appellant.

Lehman, Riggs & Lehman (George M. Lehman, of counsel), for appellee.

MCALVAY, J. Plaintiff brought suit against defendant in justice's court in the city of Detroit in assumpsit to recover as assignee for commissions claimed on a sale of real estate. This suit resulted in a judgment against plaintiff. The case was appealed by plaintiff to the circuit court for the county of Wayne, and a jury, under the charge of the court, rendered a verdict of no cause of action, upon which a judgment was entered in favor of defendant.

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The facts in the case are that Gordon F. Bennett and Jesse J. Gee were partners in the real estate business, in which defendant was at one time interested, whether as a partner or having loaned money to them to use in the business is in dispute; that Bennett & Gee, in settlement with defendant, made a transfer to him of certain lots which they owned as partners by full warranty deeds of title in fee, except as to certain mortgages assumed by defendant; that it later appeared that there were liens and taxes against the property to the amount of $275, which defendant was obliged to pay in order to clear this title, and which Bennett & Gee, or either of them, never repaid. Later Bennett engaged in the real estate business alone and obtained a purchaser for defendant for part of this same property, which defendant sold to Bennett's customer, and for which service Bennett claimed commissions, which defendant refused to pay because he claimed the partners owed him for breach of contract. Later Bennett assigned his claim for commissions to the plaintiff, and this suit was brought to recover such commissions.

Defendant pleaded the general issue in justice's court, with notice of set-off of the claim against Bennett & Gee for damages sustained by reason of breach of covenant. Upon the trial proof of such damages was admitted over the objection of plaintiff that, the covenants in the deeds being joint obligations of Bennett & Gee, the same could not be set off against the claim of plaintiff's assignor for commissions earned on the transaction which occurred after the partnership of Bennett & Gee was dissolved. Error is assigned in this court upon the admission of such evidence. There is no serious dispute as to the facts in the case. In the briefs of both parties it is stated that the sole question to be considered is a legal one, and that is whether, under the facts above stated, this set-off should have been allowed as a matter of law.

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The exact question has not been before passed upon by this court. Two separate propositions are involved in the determination of this question: *First*, whether the liability of partners upon firm contracts is joint or joint and several; and, *second*, whether the covenant in the deed in question was a joint and several covenant.

It appears to be recognized that at the common law, and in all States where the matter is not controlled by statute, the liability of partners is joint and not several, and therefore that a partnership debt cannot be used as a set-off against the claim of a partner individually. Parsons on Partnership (4th Ed.), § 262, and cases cited.

In *Mason* v. *Eldred*, 6 Wall. (U. S.) 231, Mr. Justice Field, among other things, said:

"But in copartnerships there is no such several liability. * * * Copartnerships are formed for joint purposes. The members undertake joint enterprises, they assume joint risks, and they incur in all cases joint liabilities. In all copartnership transactions this common risk and liability exist. Therefore it is that in suits upon these transactions all the copartners must be brought in, except when there is some ground of personal release from liability, as infancy or a discharge in bankruptcy; and if not brought in, the omission may be pleaded in abatement."

The contention of defendant is that this was a partnership agreement and therefore a joint and several liability, which could be set off in any suit brought by one of the partners or his assignee against a person holding a claim against the partnership, and the court held that the covenant in this deed, upon which defendant relied, was a joint and several obligation. The deed was made and executed by Bennett, plaintiff's assignor, and his partner, Gee, together with their wives, in their individual names,

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without any reference to partnership relations. They covenanted as follows:

"Parties of the first part, for themselves, their heirs, executors, and administrators, do covenant, grant, bargain, and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents they are well seised of the above granted premises in fee simple; that they are free from all incumbrances whatever," etc.

This covenant is in all respects a joint covenant and the liability under it a joint liability. If defendant had brought suit against plaintiff's assignor upon a breach of this covenant, he could have pleaded the nonjoinder of his cograntor in abatement, and consequently the plaintiff could not have set off the individual claim for commission for which this suit was brought. We are cited to cases claimed by defendant to hold to the contrary, but they are distinguishable.

In the covenant under consideration there are no words of description of the parties or any evidence of intent that the covenants were several.

Reliance is placed by defendant on the case of *Redding* v. *Lamb*, 81 Mich. 318 (45 N. W. 997), an examination of which clearly shows the distinction between that case and the instant case. In that case the parties described themselves and their different interests as "the widow and heirs of Benjamin Wilson, deceased," and individually entered into the covenant of warranty, and this court so construed the instrument.

It follows that upon neither proposition can the contention of the defendant be sustained, and that it was error to allow this joint claim against defendant's grantors as a set-off against plaintiff's demand. Defendant's remedy is against his grantors jointly. The court was in error in allowing such set-off.

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The judgment of the circuit court is reversed; and, it appearing from the uncontradicted testimony in the case that the services upon which this suit was brought were rendered and were of the value claimed by plaintiff, a judgment for $110, the amount thereof, together with interest at 5 per cent. from July 13, 1910, the date of the commencement of this suit, will be entered in this court in favor of plaintiff.

STEERE, C. J., and MOORE, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

ENSIGN v. FOGG.

1. BILLS AND NOTES—ANOMALOUS INDORSER—NEGOTIABLE INSTRUMENTS ACT—ALTERATION.

   The indorsement of a third person, appearing on the back of a note underneath the signature of the payee, is conclusively presumed to be that of a subsequent indorser, and not that of a joint maker or surety, and the contention that such indorsement of an irresponsible person in no way interested in the note, without the knowledge or consent of the maker or holder, is an alteration, cannot be sustained. Act No. 265, Pub. Acts 1905, §§ 50, 65, 69, 70, 126, 127 (2 How. Stat. [2d Ed.] § 2721 *et seq.*).

2. SAME—MOTIONS—STRIKING OUT INDORSEMENT.

   Pursuant to the provisions of section 50 of the negotiable instruments law, the request of plaintiff's counsel for leave to strike out such indorsement, made at the trial, might properly have been granted.

3. SAME—PLEADING—JUSTICES OF THE PEACE—DENIAL UNDER OATH—EXECUTION OF NOTE.

   In order to have the benefit of the defense of alteration

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under 1 Comp. Laws, §§ 767, 826 (5 How. Stat. [2d Ed.] §§ 12220, 12273), defendant must deny under oath the execution of the instrument at the time of pleading.

4. SAME—ALTERATION—HOLDER IN DUE COURSE.
In the absence of evidence that plaintiff made any change in the terms of the instrument, which defendant claimed showed an alteration, as a bona fide holder, the plaintiff was entitled to recover according to its original tenor. Act No. 265, § 126, Pub. Acts 1905 (2 How. Stat. [2d Ed.] § 2797).

5. SAME—EVIDENCE—PRESUMPTION.
Where there is nothing suspicious upon the face of an instrument, beyond the fact that an erasure is manifest, the presumption is that any alteration appearing on the face thereof was made before the execution of the instrument.

Error to Ingham; Collingwood, J. Submitted June 3, 1913. (Docket No. 15.) Decided October 1, 1913.

Assumpsit in justice's court by Charles B. Ensign against Frank M. Fogg on a promissory note. From a judgment for defendant, plaintiff appealed to the circuit court. Judgment for plaintiff. Defendant brings error. Affirmed.

L. B. Gardner, for appellant.

McArthur & Dunnebacke, for appellee.

STONE, J. This action originated in justice's court, and was brought upon a promissory note signed by the defendant, which note is in the words and figures following:

"LESLIE, MICH., ~~April~~ May 14, 1909.

"One year after date I promise to pay to the order of W. S. Hunter, Jr. ($220.00), two hundred twenty dollars, at the office of People's Bank of Leslie, Mich., value received, with interest at five per cent. per

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annum from maturity until paid, and attorney's fees, if not paid at maturity.

"Address, Leslie Mich.
"R. R. No. 4.
"Due 5—14—10.
"F. M. FOGG."

On the back of the note appear the indorsements, "W. S. Hunter, Jr. Lula G. Allen."

It appears that the suit in justice's court was begun by summons issued on December 1, 1910, returnable December 10, 1910. The summons was returned personally served on December 2, 1910. Upon the return day of the summons the suit was by consent of the parties adjourned to December 17, 1910, and from the last-named day it was further adjourned by consent and stipulation of the parties from time to time until March 4, 1911, at which date the following entry was made in the docket of the justice:

"In the above cause defendant, under his plea of the general issue, orally gives notice that the note sued upon was obtained by fraud, and for want of consideration, also of recoupment of damages, and that plaintiff is and was not a bona fide purchaser of said note."

By stipulation the suit was further adjourned from time to time to July 10, 1911, when the parties appeared for trial, and the following entry was made in the docket:

"Plaintiff moved to amend declaration, and declared orally against the said defendant, under the common counts in assumpsit, and more especially upon a certain promissory note now on file in this court. Said amendment to take effect *nunc pro tunc* as of March 4, 1911."

The case was tried in the circuit court upon the pleadings as they were made in justice's court.

It is undisputed that the note was given upon the purchase by defendant from W. S. Hunter, Jr., of a

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gas lighting plant, which was installed in defendant's country home in the spring of 1909.

The plaintiff was the only witness sworn upon the trial in the circuit court. He testified in substance that just prior to March 15, 1910, he purchased the note in question of W. S. Hunter, Sr., to whom the note had been transferred by W. S. Hunter, Jr., the payee; that he purchased the note and paid for it in the regular course of his business as a discount banker; that Lula G. Allen was in plaintiff's office perhaps with W. S. Hunter, Sr., in connection with the transfer of the note; that she put her name upon the back of the note, and he was inclined to think that she signed it in witness' office, under the general rule that he had of all paper that was brought in by a person—if a man or woman offered paper, he had the indorsement put upon it when he purchased it—that, if Lula G. Allen brought notes in the office for Mr. Hunter, she would have been required to sign on the back of the notes; that Lula G. Allen had been and perhaps then was the stenographer of W. S. Hunter, Sr., and witness understood that she was in some way or other associated with W. S. Hunter, Sr., and the plaintiff further testified on cross-examination as follows:

"There was a bunch of notes brought in at the same time with the Fogg note. I don't recall at this time how many there were. They were against various people; but I do not recall who they were. I cannot recall any person's name for certainty. I don't recall how many notes there were. There were several.

"*Q.* Did Lula G. Allen sign all those notes, indorsing them?

"*A.* I think very probably her signature was on them; but it might not have been. I think she did sign other notes, other than the one in question.

"*Q.* Have you any recollection that she did?

"*A.* Why, yes; she did. I could not undertake to tell how many notes. I cannot recall whether they

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were all signed or not, nor can I recall how many she did sign. I think probably she signed them all.

"*Q.* Why did you have her sign these notes?

"*A.* In compliance with the custom of my office; yes, sir.

"*Q.* Why did you want Lula G. Allen's name upon these notes?

"*A.* Because I thought they were brought in by her, and I always have a party that brings in a note, and makes the transaction, put their name on the note as a way of identification, because they guarantee that the notes come to them regularly, and also enables me to trace back how I got the note, who I got the note of, and who they represented, and whose office they were from. W. S. Hunter, Sr., should have signed it. It was an oversight that he did not.

"*Q.* If it had not been an oversight, you would have had W. S. Hunter, Sr., sign the note?

"*A.* He was not in at the time. He was in afterwards; but it was an oversight my not having him sign it.

"*Q.* Did Lula G. Allen sign that note there at the office before Hunter came in?

"*A.* I think very probably she did before he came in. My recollection is not quite clear on that subject; but I think she did."

The note being in evidence, and the plaintiff having rested his case, the defendant moved the court to direct a verdict against the plaintiff for the following reasons:

(1) "That there is a material alteration made in said note after the same was executed and delivered by Frank M. Fogg, the maker, and without his knowledge and consent, and with the knowledge and consent of C. B. Ensign, the plaintiff, by adding to said note the name of Lula G. Allen upon the back thereof, and therefore such material change vitiates the note."

(2) "That the indorsement of the name of Lula G. Allen upon said note after the same was executed and delivered by Frank M. Fogg, the maker, and without his knowledge and consent, and with the knowledge and consent of C. B. Ensign, the plaintiff, is a material alteration, and therefore vitiates the note."

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(4) "That there is a material alteration in that note, in crossing out the following words and figures, to wit, 'April,' and the erasure of a figure, not apparent as to what particular figure or figures, and in putting above it the following words and figures, to wit, 'May 14;' the change purporting to have been made after the execution and delivery of said note by Frank M. Fogg, the maker, thus changing the time of payment."

The said motion was overruled by the court, and a verdict and judgment for the plaintiff were directed by the court.

The defendant has brought the case here for review, and his counsel states, in his brief, that two questions are raised by the assignments of error:

First. "Is the indorsement of a note, after the same has been negotiated by the payee, by an irresponsible person who is in no way interested in the note, as owner or otherwise, and without the knowledge or consent of the maker, and with the consent and solicitation of the holder, such an alteration as will defeat a recovery thereon?"

Second. "Is the changing of the date of the note from 'April,' and the day of the month named therein, to 'May 14,' without the knowledge or consent of the maker, such an alteration as will defeat a recovery thereon?"

We will consider these questions in the order in which they are presented.

First. Counsel for appellant first calls attention to sections 126 and 127 of Act No. 265, Public Acts of 1905 (2 How. Stat. [2d Ed.] § 2797), being an act relating to negotiable instruments. Section 126 is as follows:

"Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder, in due course, not a party to the

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alteration, he may enforce payment thereof according to its original tenor."

Section 127 reads as follows:

"Any alteration which changes: *First*, the date; *second*, the sum payable, either for principal or interest; *third*, the time or place of payment; *fourth*, the number or the relations of the parties; *fifth*, the medium of currency in which payment is to be made; or which adds a place of payment where no place of payment is specified, or any other change or addition, which alters the effect of the instrument in any respect, is a material alteration."

As we understand the claim of appellant's counsel, it is that under the fourth subdivision of section 127 Lula G. Allen's indorsement changed the number and relations of the parties, and was a material alteration of the note. We are unable to agree with counsel in this claim. A careful reading of the negotiable instruments statute shows that it is expressly provided that promissory notes may be indorsed and negotiated without the consent of the maker. We think that the indorsement of this note by Lula G. Allen, after the indorsement of the payee of the note in blank, worked no change in the number or relations of the original parties to the note. She was a mere subsequent indorser.

As her indorsement was a blank indorsement, and appears upon the note below that of the payee, her liability thereon under sections 65, 69, and 70 of the act is conclusively presumed to be that of a subsequent indorser, and not that of a joint maker or surety. The entire act should be construed together and its provisions harmonized if possible. The plaintiff was the holder of this note. Section 50 of the act provides as follows:

"The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all in-

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dorsers subsequent to him, are thereby relieved from liability on the instrument."

The indorsement of this note in blank by W. S. Hunter, Jr., the payee, made it negotiable by delivery. The indorsement subsequently by Lula G. Allen was not necessary to the title of the plaintiff. The record shows that plaintiff's counsel asked leave of the court upon the trial to strike out the signature and indorsement of Lula G. Allen, pursuant to the provisions of section 50, and the court might well have granted the request.

It has been held that the intervening indorsements need not be stricken out before the trial, but may be after the plaintiff has finished his case. See Bunker on Negotiable Instruments, p. 95, citing *Mayer* v. *Jadis*, 1 Moody & R. 247. If the holder may at his will strike out such an indorsement without its affecting the liability of the maker, it cannot be held that the placing of such an indorsement upon a note is a material alteration thereof. We are of opinion that there is no merit in the contention of appellant upon this question.

Second. There are a number of reasons why the second question of appellant's counsel cannot be answered in his favor.

(a) The state and condition of the pleadings. Is the question of a material alteration an issue in the case under the pleadings? We think not under our practice. The execution of the note declared on was not denied under oath. By section 767, 1 Comp. Laws (5 How. Stat. [2d Ed.] § 12220), it is provided that the pleadings in a suit before a justice of the peace may be either written or verbal, and that the execution of a written instrument, filed with the justice, shall not be denied, except under oath, as thereinafter provided. Section 826, 1 Comp. Laws (5 How. Stat. [2d Ed.] § 12273), is as follows:

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"When any written instrument, purporting to be executed by one of the parties, is declared upon or set off, it may be used in evidence on the trial of the cause against such party, without proving its execution, unless its execution be denied by oath at the time of declaring, or pleading, or giving notice of set off, if such instrument shall be produced and filed with the justice."

It is the claim of appellant that the note was not produced and filed with the justice at the time of declaring. On the other hand, the plaintiff claims that the note was filed with the justice when the plaintiff declared on March 4, 1911, when the defendant pleaded the general issue and gave notice of the special defense, that the note was procured by fraud, etc., but that the justice neglected to note in his docket the substance of the declaration and the filing of the note sued upon, hence the entry in the docket of July 10, 1911, above set forth.

If defendant is correct in his position that there was no declaration until July 10th, we have the anomalous condition of a plea to a declaration, before the declaration was filed. If the declaration was not filed or made until July 10th, that was the proper time to produce and file the note under the statute, and the defendant should then have denied its execution under oath.

Under our practice, whenever it is claimed that the instrument declared upon has been altered or changed in any material part, so that the true tenor and effect thereof is not as pleaded or set forth, and the note has been produced and filed with the justice in accordance with the terms of the statute, the execution of the instrument must be denied on oath at the time of pleading, and such alteration is not confined to the signature only; but whenever it is claimed that the instrument declared upon and filed is not in substance the instrument executed by the party, its execution must be denied upon oath as indicated. *Pegg* v.

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Bidleman, 5 Mich. 26; *People* v. *Johr*, 22 Mich. 461; *Polhemus* v. *Savings Bank*, 27 Mich. 44; *Jourden* v. *Boyce*, 33 Mich. 302; *Lobdell* v. *Merchants' & Manufacturers' Bank*, 33 Mich. 408; *Anderson* v. *Walter*, 34 Mich. 113; *Freeman* v. *Ellison*, 37 Mich. 459; *Ortmann* v. *Merchants' Bank*, 41 Mich. 482 (2 N. W. 677); *Jenkinson* v. *Monroe Bros. & Co.*, 71 Mich. 630 (39 N. W. 854); *Inglish* v. *Ayer*, 92 Mich. 370 (52 N. W. 639); *Union Central Life Ins. Co.* v. *Howell*, 101 Mich. 332 (59 N. W. 599, and note); *Ada Dairy Ass'n* v. *Mears*, 123 Mich. 470 (82 N. W. 258); *Naftzker* v. *Lantz*, 137 Mich. 441 (100 N. W. 601); *First Nat. Bank* v. *Carter*, 138 Mich. 421 (101 N. W. 585); *Charles H. Werner & Sons Co.* v. *Lewis*, 155 Mich. 450 (119 N. W. 431).

(b) Another reason why defendant cannot maintain his second claim is that there was no evidence that plaintiff made any alteration in the date of the note. There was no evidence that the plaintiff was not a holder, in due course, for value before maturity, and under the terms of section 126 of the negotiable instruments act, above quoted, it is provided as follows:

"But when an instrument has been materially altered and is in the hands of a holder, in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

According to the claim of defendant, by its original tenor the note bore date in April. Interest began to run at maturity, hence by the claimed original tenor of the note plaintiff would be entitled to a larger judgment than he recovered for he recovered interest only from May 14, 1910.

(c) There was no evidence that the date of the note was altered after execution. The defendant relies upon a presumption merely. An inspection of the note furnishes us with no evidence that the note was altered after it was signed. There is nothing

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suspicious in the appearance of the note. It may have been as claimed by plaintiff, that as originally prepared it bore the word "April," but when signed the change was made to "May 14" by an indelible pencil. The bottom of the note shows the figures in pencil "5—14—10," indicating when due.

We think that the rule is now well established in this State that, where there is nothing suspicious upon the face of an instrument beyond the fact that an erasure is manifest, the presumption is that the alteration was made before the instrument was executed. *Munroe* v. *Eastman*, 31 Mich. 283; *Sirrine* v. *Briggs*, 31 Mich. 443; *Newland* v. *Baptist Church Society*, 137 Mich. 335 (100 N. W. 612); *Arnold* v. *Brechtel*, 174 Mich. 147 (140 N. W. 610); *Connery* v. *Connery*, 175 Mich. 544 (141 N. W. 615).

So in any view of the case which we are able to take on this record, we are of the opinion that the circuit court reached the correct conclusion in directing a verdict for the plaintiff, and the judgment of the circuit court is affirmed.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, OSTRANDER, and BIRD, JJ., concurred.

MCNAIR v. PARR.

1. CONTRACTS—PUBLIC POLICY—TRIAL—CROSS-EXAMINATION—PHYSICIAN AND PATIENT.

Since an agreement between defendant's family physician and a surgeon called in for the purpose of an operation,

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that the surgeon should divide his fees with the physician, is against public policy and void, in a suit for the expense of the operation, defendant was entitled to wide latitude in cross-examination of plaintiff, and was entitled to show a tacit understanding, as claimed, growing out of previous dealings in similar cases between the two practitioners.

2. PHYSICIANS AND SURGEONS—CONTRACTS—ASSUMPSIT.

In an action by a surgeon as plaintiff for services performed in certain operations on defendant and his daughter, the court should have given a request preferred by defendant, that the plaintiff could not recover for services of defendant's family physician who assisted in the operations and who called plaintiff in to perform them, under an express arrangement or tacit understanding to divide the fees, to be charged by plaintiff; and a judgment that might, under the court's charge, have included the value of such services, was erroneous, since the other medical advisor, who was not a witness or party to the case, could not be bound or estopped, and might bring a separate action for his services.

Error to Kalamazoo; Knappen, J. Submitted June 10, 1913. (Docket No. 58.) Decided October 1, 1913.

Assumpsit by Rush McNair against Fred Parr for services rendered. Judgment for plaintiff. Defendant brings error. Reversed.

Edward J. Anderson, for appellant.

Alfred J. Mills and *Alfred S. Frost*, for appellee.

STONE, J. This is an action of assumpsit to recover for professional services as physician and surgeon in operating upon the defendant for hernia, and upon his daughter for appendicitis. The declaration was on the common counts in assumpsit, and the plaintiff filed a bill of particulars for the operations and the professional visits afterwards, which the testimony showed were included in the charge for opera-

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tions. For each operation and the accompanying visits there was a charge of $200, and the total amount claimed in the suit was $400.

The plea was the general issue, and the notice thereunder claimed, among other things, that at the time the causes of action arose there existed between the plaintiff and one Cicero M. Stuck, a physician, who was then the defendant's physician, in the matters claimed for in said declaration, an unlawful agreement and combination, by which the said plaintiff and the said Cicero M. Stuck were to divide the fee which, it is claimed, this defendant was to pay the plaintiff for the surgical operations and professional visits mentioned in plaintiff's bill of particulars and declaration on file in the case, which combination was unlawful and void, as contrary to public policy, and in violation of the statutes and common law of this State.

Upon the trial the plaintiff testified that Dr. Stuck asked him to see the defendant, and went with him and introduced him to the defendant, and that Dr. Stuck assisted plaintiff in both operations, and on cross-examination he testified that he had operated a number of times on patients of Dr. Stuck covering a period of 15 years; that there was absolutely nothing said between Dr. Stuck and himself concerning the fees. He further testified as follows:

"I never had, as far as this case was concerned; there was nothing actually said about fees.

"*Q.* What do you mean?

"*A.* Mr. Parr and his daughter.

"*Q.* I mean in all these cases, if you had an understanding or talk with him what you were to charge him for operating on his patients?

"*A.* No, sir.

"*Q.* And did you not fix the rate for appendicitis with him at $100?

"*A.* No, sir.

"*Q.* Is not that what you charged his patients?

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"*Mr. Mills:* I object to what he charged his patients.

"*The Court:* Yes.

"*Mr. Anderson:* I want to show what it is worth.

"*The Court:* I do not think that tends to show it.

"*Mr. Anderson:* Also to show that there was an established rate between them.

"*The Court:* I do not think the question proper.

"*Mr. Anderson:* An exception.

"*Q.* Isn't it a fact, Doctor, that you divided your fees with Dr. Stuck on those former cases?

"*Mr. Mills:* Objected to as incompetent, irrelevant, and immaterial; it is not pleaded.

"*The Court:* Yes.

"*Mr. Anderson:* The purpose is to show that Dr. Stuck, our physician, has always acted as the agent of Dr. McNair, unbeknown to us, and has received a commission or a part of a fee.

"*The Court:* I do not think that makes any difference; that might be so. Dr. McNair would have a right to charge what his services were worth, no matter what he does with the proceeds.

"*Mr. Anderson:* We offer it for the purpose of showing it was an unlawful understanding.

"*The Court:* I think the objection should be sustained at that; it will be sustained.

"*Mr. Anderson:* Note an exception.

"*Q.* Is it not a fact that it was understood between you and Dr. Stuck that you were to divide your fees in this case at issue, unbeknown to Mr. Parr?

"*A.* Dr. Stuck and I had absolutely not a word between us concerning Mr. Parr's case or that of his daughter.

"*Q.* Was it not the tacit understanding between you and Dr. Stuck that you were to divide your fees?

"*Mr. Mills:* The same objection.

"*The Court:* That is calling for the conclusion of the witness; the best evidence would be some conversation on the subject. The objection should be sustained.

"*Mr. Anderson:* It is offered for the same purpose.

"*The Court:* Yes.

"*Mr. Anderson:* Note an exception.

"*Q.* Is it not a fact that the understanding between

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you and Dr. Stuck came about on account of your division of other cases?

"*Mr. Mills:* I object to it, and object to counsel inquiring along that line.

"*Mr. Anderson:* It is offered for the same purpose.

"*The Court:* The objection is sustained.

"*Mr. Anderson:* An exception to all of these rulings.

"*Q.* Did you intend to divide your fee which you received from Mr. Parr for his operation and his daughter's with Dr. Stuck?

"*Mr. Mills:* Objected to for the same reason.

"*Mr. Anderson:* An exception. We offer it for the purpose of showing it enhanced the doctor's charges against Mr. Parr for these operations.

"*The Court:* I think you may ask this question, if Dr. McNair made the charge against either of these people larger than his services would entitle him to because of any understanding he had with Dr. Stuck that he would divide with him? You can take an answer to that question.

"*A.* As I said before, there was no understanding between Dr. Stuck and myself, or any language justifying one that I entertained in my mind concerning it.

"*Q.* What was your former practice leading up to this time in regard to that?

"*Mr. Mills:* Objected to.

"*The Court:* I have ruled, I think; the question is whether he made his charge larger than he would ordinarily make it on occasions before that on account of Dr. Stuck, and he says, 'No.'

"*Mr. Anderson:* I offer it for the same purpose; an exception.

"*Q.* Hasn't it been your practice, generally, down to the time you operated on Mr. Parr, to divide your fees with the physician of the patients upon whom you operated?

"*Mr. Mills:* I object to that as incompetent, irrelevant, and immaterial, and a gratuitous insult to the witness.

"*The Court:* You can have an exception to that."

The plaintiff further testified that Dr. Stuck had called his attention to the case as one which required

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an operation; that Dr. Stuck did not tell witness that he had any talk with defendant about plaintiff's charges, or what his fees would be for operating; that there was absolutely nothing said concerning any fees; and that plaintiff had operated for hernia upon several of Dr. Stuck's patients previous to the time he operated on the defendant. He did not know that Dr. Stuck had told defendant that plaintiff was to charge $40 to $60 for operating on him; that was not the regular fee he had been charging Dr. Stuck's patients for operations. He did not recollect that he had charged any of them over $100; that he had not paid Dr. Stuck anything, and did not pay the sisters for the hospital bill; that he charged $200 outside of all those expenses for his personal work.

Near the close of the testimony the plaintiff was recalled, and in answer to questions by the court testified as follows:

"*Q.* Did your bill include Dr. Stuck's bill, too, or was that just for your personal services?

"*A.* That was for the entire operation.

"*Q.* For what you did.

"*A.* That included my assistant's fees, also.

"*Q.* Dr. Stuck?

"*A.* Yes, sir.

"*Mr. Anderson:* *Q.* You had an arrangement with Dr. Stuck, did you, to divide your fees with him?

"*A.* I had no arrangement in regard to the matter at all; I expect to pay Dr. Stuck for his assistance.

"*Q.* How much of that fee were you to give Dr. Stuck?

"*A.* That will be according to what he considers it worth.

"*Q.* Don't you know that Fred Parr didn't know anything about the arrangement between you and Dr. Stuck?

"*A.* Fred Parr knew that Dr. Stuck was going to assist me because he was the family physician.

"*Q.* Don't you know that Fred Parr didn't know anything about the arrangement between you and Dr. Stuck?

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"*A.* I don't know whether he did or not."

The defendant testified that he supposed he was to pay Dr. Stuck; that he never knew from Dr. Stuck or the plaintiff that he was to pay the plaintiff for Dr. Stuck's services.

The defendant requested the court to charge the jury that they could not allow plaintiff any money for the services of Dr. Stuck rendered at these operations. This request was refused. In its charge the court, in stating the plaintiff's claim, said:

"He claims, also, that in the operative part of it, it was necessary and customary for him to have other assistance to enable him to skillfully, correctly, and properly perform the operation, and that he became indebted to them; that their work was a part of his work; that they acted as his assistants—for all of which he charges $400. * * * What were the plaintiff's services fairly and reasonably worth, taking into consideration * * * the fact of the assistance that it was necessary for him to employ, if he did employ any, as you find from the testimony, and determine from all those facts what the fair compensation would be in these particular cases."

The jury returned a verdict for the plaintiff for $393 damages, and a judgment accordingly was duly entered.

The defendant has brought the case here on writ of error, and there are 50 assignments of error. Many of them possess no merit.

The first six assignments of error are based upon the rulings of the court above set forth, and relate to the offer and attempt of the defendant to show by the plaintiff, on cross-examination, that the understanding between the plaintiff and Dr. Stuck, defendant's family physician, was that the plaintiff was to split his fee with Dr. Stuck, which fact was unknown to defendant.

It is urged by appellant, and we think that the evidence warrants the claim, that it appears from the

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record that Dr. Stuck was the defendant's family physician at the time these operations were performed, and had been employed in regard to the ailments for which the operations were performed to the knowledge of the plaintiff. The plaintiff, after testifying that his bill was only for his personal work, changed his position and testified, in answer to a question by the court, that his bill included Dr. Stuck's bill. He also testified that he did not know whether defendant knew anything about the arrangement between him and Dr. Stuck in regard to their fees. The testimony of the defendant was uncontradicted, that he knew nothing of any arrangement between the plaintiff and Dr. Stuck by which the latter was to get a part of the plaintiff's fee sued for in the case.

The cross-examination above set out was based upon the notice under the general issue, and the defendant sought to show a tacit understanding between the plaintiff and Dr. Stuck, growing out of their former practice in other similar cases, in the matter of a division of fees. We think that the trial court applied too strict a rule in the cross-examination of the plaintiff to the prejudice of the defendant. Considerable latitude should be allowed in cross-examination when fraud is claimed.

It is the claim of the defendant that Dr. Stuck could not be the agent of both of the parties to the suit, while he was at the same time assisting in these operations as the family physician of the defendant; and that he could not draw pay from both parties, without the knowledge of all the facts by the defendant; and that any tacit understanding or agreement between the two doctors of any division of the plaintiff's fees between them would be against public policy and void; and that defendant had a right to show that the plaintiff had charged an unreasonable sum for his services, in order to divide his fees with Dr. Stuck. That such a contract is against public policy

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the defendant cites the following cases: *Flint, etc., R. Co.* v. *Dewey,* 14 Mich. 478; *Scribner* v. *Collar,* 40 Mich. 375 (29 Am. Rep. 541); *McNamara* v. *Gargett,* 68 Mich. 454 (36 N. W. 218, 13 Am. St. Rep. 355); *Wilbur* v. *Stoepel,* 82 Mich. 344 (46 N. W. 724, 21 Am. St. Rep. 568); *Cleveland* v. *Miller,* 94 Mich. 97 (53 N. W. 961); *Friar* v. *Smith,* 120 Mich. 411 (79 N. W. 633, 46 L. R. A. 229); *Hannan* v. *Prentis,* 124 Mich. 417 (83 N. W. 102); *Hogle* v. *Meyering,* 161 Mich. 472 (126 N. W. 1063); 9 Cyc. pp. 481, 482; 31 Cyc. p. 1430.

We are of opinion that the above authorities support the claim of the defendant, and any agreement of plaintiff to split his fees with Dr. Stuck, without the knowledge of the defendant, would be void as against public policy.

By the fiftieth assignment of error it is claimed that the court erred in refusing to give the defendant's request above referred to, which was to the effect that the plaintiff could not recover for the services rendered by Dr. Stuck. It is claimed by appellant not only that it appeared by the undisputed testimony that Dr. Stuck was defendant's family physician acting for him, and for whose services he is personally liable to Dr. Stuck, but also that the declaration and bill of particulars make no charge for such services, and that plaintiff is limited to his claim therein. It should be noted that Dr. Stuck was not sworn as a witness in this case, and he is not estopped from bringing a suit and recovering for his services rendered for the benefit of defendant in this matter under our holding in *McCain* v. *Smith,* 172 Mich. 1 (137 N. W. 616); the services having been accepted by the defendant.

If this judgment were to stand, the defendant may have to pay twice for the services of Dr. Stuck. That they are included in this judgment we have a right to presume under the charge of the court; but the value

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of such services does not appear. Dr. Stuck is not a party to or bound by this judgment, and might maintain a suit against the defendant for his services. We think there was prejudicial error in that part of the charge referred to.

We have examined the other assignments of error, and in our opinion they are without merit.

For the errors pointed out, the judgment of the circuit court is reversed, and a new trial granted.

MOORE, MCALVAY, BROOKE, and KUHN, JJ., concurred with STONE, J. STEERE, C. J., and OSTRANDER and BIRD, JJ., concurred in the result.

PARKINSON *v.* PARKINSON.

1. DIVORCE—SEPARATE MAINTENANCE—EQUITY—LACHES—PLEADING.

   In a suit for separate maintenance, the question of laches may be raised by demurrer.

2. SAME—HUSBAND AND WIFE.

   Mere lapse of time does not constitute laches unless it results in prejudice to the other party: and, therefore, delay of the wife in attempting to enforce her right to separate support, following litigation over a divorce and her failure to move for about ten years, does not of itself bar her suit under 3 Comp. Laws, § 8686 (4 How. Stat. [2d Ed.] § 11534, *et seq.*), where complainant filed a bill for divorce soon after their separation and on her discontinuing the proceedings, defendant filed a second bill and obtained a decree which was reversed on appeal, and where complainant made criminal complaint against

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her husband for desertion and procured an order that defendant pay her $3 a week; the order having been complied with.

Appeal from Wayne; Hally, J. Submitted June 10, 1913. (Docket No. 50.) Decided October 1, 1913.

Bill by Mary E. Parkinson against Charles A. Parkinson for separate maintenance. From an order overruling a demurrer to the bill of complaint defendant appeals. Affirmed.

H. H. Markham, for complainant.

Frank W. Atkinson (Moloney & Atkinson, of counsel), for defendant.

KUHN, J. This is an appeal from an order overruling a demurrer to the petition of complainant filed under the provisions of section 8686, 3 Comp. Laws (4 How. Stat. [2d Ed.] § 11534), which confers upon chancery courts jurisdiction to compel husbands to support their wives under certain circumstances. The facts which led up to the filing of this petition are substantially as follows: Complainant and the defendant were married September 16, 1877, and lived together as husband and wife until some time in 1900, when it is claimed that the defendant deserted the complainant. In May of 1900 the defendant filed a bill for divorce in the Wayne circuit court. An answer was filed and the cause was discontinued in open court in January, 1901. In December, 1901, the defendant filed a second bill for divorce. Complainant appeared and a decree was given the defendant in July, 1902, but the decree was reversed by this court in September, 1903. In September, 1905, complaint having been made in the police court of the city of Detroit of the failure of the defendant to support complainant, an order was made by that court

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requiring the defendant to pay complainant the sum of $3 per week, which has been done. Various grounds of demurrer are alleged, but the one argued before the court below and urged here is that the complainant has been guilty of laches in presenting her petition to the chancery court, and that therefore her petition should be dismissed.

In this connection, the first question discussed is whether the question of laches can be raised by demurrer. That this can be done is well settled in this State, and it is only necessary to call attention to some of the authorities. *McLean* v. *Barton,* Har. Ch. (Mich.) 279; *Campau* v. *Chene,* 1 Mich. 400; *Reynolds* v. *Green,* 10 Mich. 355; *Baent* v. *Kennicutt,* 57 Mich. 268 (23 N. W. 808); *Eames* v. *Manley,* 121 Mich. 300 (80 N. W. 15); *Judson* v. *Judson,* 171 Mich. 185 (137 N. W. 103).

The court, in his opinion overruling the demurrer, expressed some doubt concerning the right of the defendant to demur or plead in this action, being in doubt whether the full chancery practice followed because the chancery court was given jurisdiction of the petition. As this question is not raised by complainant, it is not before us.

Conceding that the question of laches was properly raised by demurrer, which practice was recognized by this court in *Meyerl* v. *Meyerl,* 125 Mich. 607 (84 N. W. 1109), we are of the opinion that there is no merit in defendant's claim that the petitioner should be barred because she has refrained from compelling defendant to adequately provide for her during the period which has elapsed between the time she claims the desertion took place and the time of the institution of these proceedings.

The mere lapse of time does not necessarily constitute laches. It must result in changing the position of the other party. *Quinn* v. *Tully,* 174 Mich. 30 (140 N. W. 492).

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In the case of *Stone* v. *Stone*, 162 Mich. 319 (127 N. W. 258), to which our attention is challenged, one of the parties remarried after a divorce had been obtained in another jurisdiction while a suit for divorce had been pending in this State. It was held that the failure to press this suit for 13 years, during 8 of which complainant knew of the other divorce, and that, relying thereon, defendant remarried, would prevent her from objecting to a dismissal of her bill. The court said:

"We are of opinion that it would be inequitable and against sound public policy to permit her to do so."

In *Reed* v. *Reed*, 52 Mich. 117 (17 N. W. 720, 50 Am. Rep. 247), where laches was held gross, a divorce had been obtained in another jurisdiction and apparently was acquiesced in for 13 years, and the complainant remained apart from defendant against his will and in disregard of his repeated requests to return to him.

In the case of *Judson* v. *Judson*, *supra*, the demurrer was sustained on the ground of laches because the court found that no valid marriage existed and the parties were not husband and wife and never had been, in the State of Michigan.

In the instant case the petition charges desertion on the 24th day of July, 1900, and that defendant has refused to live with her from that time on, and that she was without fault and gave him no just cause for deserting her. Under our statute, the desertion must be continuous for a period of two years before she could file a bill for divorce on that ground. Can it be said to be less desertion if complainant concluded to show tolerance and wait for a longer period? The purpose of placing the period at two years was undoubtedly to prevent hasty action in alleging this ground for separation. Complainant has been patient

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and overlooked the shortcomings of defendant. Her forbearance should not now be rewarded by denying her relief if she is entitled to it.

The order of the court overruling the demurrer is affirmed.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ., concurred.

WELLING *v.* KALAMAZOO LUMBER CO.

1. CUSTOMS AND USAGES—EVIDENCE—SUFFICIENCY.

   Testimony of a carpenter and cabinet maker, who did not have general knowledge, of a custom in the community to use a guard on a universal saw, and who gave testimony covering merely his experience, should have been withdrawn by the court from the consideration of the jury, by an instruction that there was no competent evidence of a custom in that vicinity to use guards on such machines, in a personal injury action against his employer.

2. MASTER AND SERVANT—ASSUMPTION OF RISK.

   Where plaintiff had used the saw at which he was injured on occasions previous to his injury, and knew how to operate it, the court erroneously instructed the jury that there was no contract of hire to do the machine work; plaintiff assumed such risks as were or ought to have been obvious to him, in the exercise of reasonable care.[1]

[1] As to assumption of obvious risk of hazardous employment, see note in 1 L. R. A. (N. S.) 272. And for assumption of risk of defective tool, machine, or appliance, where the defect is obvious, but its importance not appreciated, see note in 13 L. R. A. (N. S.) 691.

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3. SAME—DEFECTIVE OR UNGUARDED MACHINERY—RISKS ASSUMED —NEGLIGENCE.

Where defendant claimed and offered evidence tending to prove that its superior servant had told the plaintiff to lower the saw, and that plaintiff had failed to comply with the instructions, defendant was entitled to have its request given, that if plaintiff was hurt because he did not lower the saw, and the other facts were found as claimed by the defense, he could not recover.

4. SAME—OBVIOUS DEFECTS—SAWDUST.

Upon testimony having a tendency to show that an accumulation of sawdust under the machine might have caused plaintiff's injury, the court did not err in refusing to instruct the jury that plaintiff could not recover on that claim, since it appeared that he was not the regular operator of the saw.

Error to Kalamazoo; Knappen, J. Submitted June 12, 1913. (Docket No. 52.) Decided October 1, 1913.

Case by John C. Welling against the Kalamazoo Lumber Company for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed.

Boudeman, Adams & Weston, for appellant.

Smedley, Linsey & Lillie, for appellee.

The plaintiff, a man 48 years of age, was a carpenter and cabinetmaker by trade. He worked as a cabinetmaker in Grand Rapids some six or eight years, and as a carpenter in Kalamazoo six or seven years. He entered the employ of the defendant on March 25, 1910, and was injured on August 12, 1910. Defendant operates a lumber yard and planing mill. In its manufacturing plant it uses various machines and saws, including those ordinarily used in producing interior finish. Plaintiff's work in defendant's factory consisted in nailing up forms and doing all kinds of stair work and carpenter work. He worked

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at a bench located some 25 feet west of the saw upon which he was injured.

This machine was what is known as a universal saw, the table was of iron, 3x4 feet, and the saw could be lowered or raised by means of a wheel or crank in the front of the table. This saw had been used by plaintiff a half dozen or dozen times during the course of his employment. Such use was only occasional and for the purpose of preparing a single piece now and then, of which plaintiff was in immediate need in the production of his work. On the morning in question the machine man who usually prepared the material for plaintiff's work was otherwise engaged. Though working upon the machine in question, he was getting out material for another carpenter. Plaintiff was instructed to build some newel posts, and to himself machine the material necessary for their construction. He went to the stock room and secured the necessary lumber, and ripped it or sawed it up upon a machine on the lower floor. He then carried it upstairs to his bench, and proceeded to nail it up. It then became necessary to prepare pieces for the "trim" of the posts. These were pieces of pine board 3 inches wide, ⅞ of an inch thick, and about 5 feet long. The machine near his bench being at that time idle, plaintiff took his boards to it for the purpose of sawing strips off—thus making them exactly 3 inches wide. He adjusted the gauge to 3 inches, threw the belt from the "loose" to the "drive" pulley, and proceeded with the work.

The man who had preceded him upon the machine had left it so adjusted that about 3 or 4 inches of the saw projected above the table. Plaintiff did not lower the saw though he testifies he knew the crank in front of the table was there for that purpose, and had seen it so used. After running through 4 or 5 pieces, and while in the act of pushing another through, the board upon which he was working

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"kicked back," and struck him in the face. He momentarily lost his balance, and his left hand came in contact with the saw, severing his index and second fingers at the first joint. After an absence of less than two weeks, he returned to work and remained until late in October, when he was laid off.

He later brought suit, charging defendant with negligence (1) in failing to have the saw properly guarded, according to law; (2) in permitting sawdust to accumulate to a dangerous degree under the saw; and (3) in failing to properly instruct plaintiff as to the dangers incident to the operation of the saw.

It affirmatively appeared and the court charged the jury that the saw in question was the best of its kind and in perfect repair at the time plaintiff was injured.

At the conclusion of plaintiff's case, it having been made to appear that the accident was primarily attributable to the fact that the saw was too high—projected too high through the top of the table—plaintiff's counsel asked leave to amend his declaration, charging that defendant was negligent in failing to warn and instruct plaintiff as to the necessity of lowering the saw. This amendment was permitted over defendant's objection. Plaintiff secured a judgment, which is now reviewed on writ of error.

BROOKE, J. *(after stating the facts).* There are some 45 assignments of error, only a few of which we will consider. We find it unnecessary to pass upon the propriety of allowing the amendment, as the case must be reversed upon other grounds.

It appeared that the factory inspector had never ordered a guard to be placed upon the saw in question. Plaintiff then endeavored to show that it was customary to use guards upon such machines in that vicinity. At the close of the evidence of the only

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witness by whom it was sought to show this custom, the following occurred:

"*Mr. Adams:* I move to strike out the testimony, as far as the general custom is concerned, of the witness in the city of Kalamazoo as irrelevant, immaterial, and inadmissible.

"*The Court:* The motion should be granted; he doesn't seem to know very much about the custom.

"*Mr. Linsey:* An exception.

"*The Court:* He should have some knowledge of the general custom prevailing in the city; part is hearsay, and some of it was a good ways back.

"*Mr. Adams:* A man who has worked on machines of this kind might give expert testimony as to the machine; but now he has testified to a custom. That is not a question of experience; that is a question of knowledge. My point is that from his own showing here before the court and jury that he has not qualified himself, and shows affirmatively that he does not know what the custom is.

"*Mr. Linsey:* Here is a man who has worked in a great number of shops for 20 years on this kind of saws, and he says he knows what the custom is. In every place where he has worked they have used them, and in but one instance did he testify as to it being hearsay.

"*The Court:* The motion may be denied *pro forma.* I will think it over."

Upon this point the court charged as follows:

"I charge you that, while it is the general rule of law, it is not the duty of the master to furnish guards on a ripsaw or a saw of the kind which plaintiff was injured upon in the absence of an order made by the State factory inspector; however, if you find that plaintiff was ordered outside of the scope of his employment, and it is, as he claims, the custom to guard these kind of saws in this vicinity, and the injury resulted in the failure to have a guard upon this saw, then it was the duty of the defendant to have this saw guarded, and in the absence of a guard it would be negligence."

We are of opinion that the court should have adhered to the original ruling, and charged the jury

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that there was no competent evidence of a custom to use guards on such machines in the vicinity of the city of Kalamazoo. *Ledyard* v. *Hibbard,* 48 Mich. 421 (12 N. W. 637, 42 Am. Rep. 474); *Black* v. *Ashley,* 80 Mich. 90 (44 N. W. 1120); *Eaton* v. *Gladwell,* 108 Mich. 678 (66 N. W. 598).

Upon the question of the assumption of risk, the court charged:

"I charge you, gentlemen of the jury, that if you find the plaintiff was ordered to work upon this saw by Mr. Lage, through Mr. Hice, who was acting as foreman, and the plaintiff did proceed to work upon this saw and do his own machine work in pursuance of this order, then he, working outside the scope of his regular employment, of the particular work he was hired to do, therefore, did not necessarily assume the risk of all obvious danger incident to the work upon that machine. I charge you that assumption of risk arises from the contract; the servant assuming the risk of all obvious dangers incident to the service which are known or should have been known to him. In this case there was no contract of hire to do this machine work, and, therefore, if the plaintiff was ordered to work upon this machine by the defendant's foreman, he did not by that act assume the risk."

And again:

"I charge you that the risks which the servant actually assumes are only those which are incident to the employment, and he may always require of a master response for injuries resulting from his personal negligence, that is, the master's personal negligence. Cases of this sort occur when the master exposes the servant to unsafe machinery or sends him into places where there are risks of which he is ignorant. This principle may be applicable even when the risks are apparent and fully opened to observation, provided the servant from his inexperience or other causes is incapable of fully understanding and appreciating them."

We think the first of these instructions is erroneous

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and misleading. The plaintiff in undertaking to operate the machine in question did assume the risk of all obvious danger incident to the work upon that machine. In other words, considering his age and experience, he must be held to have assumed such risk as was, or in the exercise of ordinary prudence should have been, obvious to him.

The second excerpt quoted above is taken from an opinion in the case of *Chicago, etc., R. Co.* v. *Bayfield*, 37 Mich. 205, 211, 212, when plaintiff's intestate, a boy between 17 and 18 years of age, physically lame and mentally weak, employed as a common laborer, lost his life in attempting to obey an order of the master requiring him to act as brakeman. The observations of the court were peculiarly pertinent to the facts in that case, and, while technically correct as an abstract legal proposition, we are of opinion that the instruction should not have stopped where it did, but that the court should have stated the converse of the proposition, and instructed the jury that the plaintiff did assume such risk as was or should have been obvious to him.

Plaintiff produced a witness named George Hice, who was defendant's foreman at the time of the accident, and who gave plaintiff the order to machine his own material. This witness, though with apparent reluctance, testified that he had instructed plaintiff as to the necessity for lowering the saw when ripping this material so that the saw would "just make a clean cut," and also how to lower it.

Upon this point defendant preferred the following request:

"If you find that it was safer to lower the saw in order to saw what the plaintiff wanted to saw on the morning in question, and if you further find that plaintiff did not lower the saw, and because he did not, if he did not lower the saw, he was hurt, and if you further find that Hice had before the time of the

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accident, whether on that day or on some other day or days, told the plaintiff to lower the saw so that the saw just came through the material to be sawed, or told him that in substance, then plaintiff cannot recover."

We think this was a proper request, and should have been given.

It is urged by defendant that the court should have instructed the jury that:

"Plaintiff cannot recover on account of any claim that he makes that sawdust was under the machine and about the saw"—citing *Willis* v. *Besser-Churchill Co.*, 126 Mich. 659 (86 N. W. 133).

We do not think that case controlling. In the instant case the plaintiff was not the regular operator of the machine, and therefore we think should not be charged with notice of the condition, as a matter of law. Of course, he was bound to take notice of a condition clearly obvious, the effect of which was, or should have been, known and appreciated by him. But it is said that it is not shown that the presence of the sawdust interfered in any way with the plaintiff, or caused or contributed in any way to his injury. There is some testimony, though not very convincing, to the effect that the presence of the sawdust may have contributed to the accident.

Other errors assigned have been examined, but require no discussion.

The judgment is reversed, and a new trial ordered.

STEERE, C. J., and MOORE, MCALVAY, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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NATIONAL SURETY CO. *v.* GRANT.

1. NEW TRIAL—WEIGHT OF EVIDENCE—JURY QUESTION.
   Where defendant was charged with receiving a check for $593.56, which he was not entitled to, from his successor in the office of township treasurer, and on the trial plaintiff's evidence was contradicted by that of defendant and by certain alleged admissions of his successor in office, the issue was one for the jury and the court properly denied a motion for new trial on the ground that the weight of the testimony was for the jury.

2. SAME—NEWLY DISCOVERED EVIDENCE.
   It was not an abuse of discretion to deny a new trial for which plaintiff asked, on the ground of newly discovered evidence, when the testimony was merely cumulative and might have been produced on the trial with the exercise of due diligence.

Error to Presque Isle; Emerick, J. Submitted June 16, 1913. (Docket No. 97.) Decided October 1, 1913.

Assumpsit by the National Surety Company against Fred O. Grant for money had and received. Judgment for defendant. Plaintiff brings error. Affirmed.

I. S. Canfield, for appellant.

C. S. Reilley, for appellee.

BROOKE, J. In April, 1906, defendant was the outgoing treasurer of the township of North Allis. The township board met on March 21st and found a balance due from defendant to the township of $2,878.73. On April 24, 1906, defendant met William A. Wright, the incoming treasurer, at the office of the Onaway Banking Company, in which institution the township

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funds were deposited, and there turned over to Wright certain paid orders, together with a check for $1,669.30 on the Onaway Banking Company. Altogether these sums equaled the sum of $2,878.73 found by the board to be due. Plaintiff was surety upon Wright's bond. In October, 1906, Wright was found short in his accounts and resigned. Plaintiff and Wright were afterwards sued by the township, and a judgment was recovered for $496.16 and costs, which were taxed at $60.50. These sums were paid by plaintiff.

Plaintiff thereupon, as assignee of Wright, brought the instant suit against defendant. It was plaintiff's claim that on April 26, 1906, two days after defendant had given Wright the check for $1,669.30 in settlement of his account with the township, defendant went to Wright and falsely and fraudulently represented to him that he (Grant) had overpaid him to the amount of $593.56. That on said day defendant secured from Wright a check on the township fund for that sum, which was immediately deposited in the Onaway Bank to cover an overdraft of Grant's for that amount, created by the giving of the check for $1,669.30 on April 24th. These facts were testified to by Wright, and testimony was given by Frank D. Hughes, at that time cashier of the Onaway Banking Company, tending to support plaintiff's theory. The books of the banking company were introduced in evidence. The entries therein, if they represented actual transactions, strongly supported plaintiff's claim. On the other hand, defendant flatly denied ever having received from Wright the check in question, and it was shown (indeed, Wright himself testified) that upon the discovery of Wright's shortage he (Wright) protested to the township officials that he had ever given defendant the check in question. Wright was unable to produce the canceled voucher. Under these circumstances, the case resolved itself

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into a pure question of fact, which was submitted to the jury in a careful charge, to which no exception is taken. The jury returned a verdict for defendant.

In this court plaintiff argues but two assignments of error:

(1) The verdict is against the great weight of the evidence.

(2) The court erred in refusing to grant a new trial because of newly discovered evidence.

1. We have perused this record with care and interest, as it presents an anomalous state of facts. Both Wright and defendant appear to be men of good reputation and seeming honesty. Yet they flatly contradict each other upon an important question of fact, the actual truth concerning which is known to them alone and about which neither can very well be mistaken. From a perusal of the record it is difficult to determine where the right of this controversy lies. The jury heard the evidence of these men and determined that defendant told the truth. The circuit judge saw the witnesses and heard them testify and denied a new trial. We are of opinion that in so ordering there was no abuse of discretion. *Dupuis* v. *Traction Co.*, 146 Mich. 151 (109 N. W. 413).

2. We are satisfied that the court below properly denied a new trial upon the ground of newly discovered evidence. This case was tried more than five years after the happening of the events out of which it arose. The evidence of McQueen (the newly discovered witness) is cumulative only. We think reasonable diligence on the part of plaintiff would have discovered its existence. *Canfield* v. *City of Jackson*, 112 Mich. 120 (70 N. W. 444); *Grand Rapids Electric Co.* v. *Manufacturing Co.*, 142 Mich. 4 (105 N. W. 1).

The judgment is affirmed.

STEERE, C. J., and MOORE, MCALVAY, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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ULTZ v. UPHAM.

1. DEEDS — CONSTRUCTION — WILLS — LIFE ESTATE — "HEIRS" — WORDS AND PHRASES.

Under a deed granting farm lands to the daughter of the grantors for her life and "at her death to her legal heirs excepting her present husband," containing covenants of seizin, warranty, and against incumbrances, and executed in conjunction with a life lease of the premises from the grantee to the grantors, the said daughter took a life estate with the remainder over to her legal heirs subject to the exception: the instrument was not testamentary in character.

2. ADOPTION—HEIRS—DESCENT AND DISTRIBUTION.

The term "legal heirs," employed in the granting clause of a deed, included the adopted son of the grantee, who took title as if he had been an own child, under 3 Comp. Laws, § 8780 (4 How. Stat. [2d Ed.] § 11640), which provides that the persons adopting "shall thereupon stand in the place of a parent or parents to such child in law and be liable to all the duties and entitled to all the rights of parents thereto and such child shall thereupon become and be an heir at law of such person or persons, the same as if he or she were in fact the child" thereof.[1]

Appeal from Branch; Knowlen, J. Submitted June 13, 1913. (Docket No. 103.) Decided October 1, 1913.

Bill by Sarah I. Ultz against Charles Upham and others for the construction of a deed. From a decree for complainant, defendants appeal. Reversed.

H. H. & B. E. Barlow, for complainant.

Clayton C. Johnson and *Charles U. Champion*, for defendants.

[1] The question whether terms "child," "children," "issue," etc., in a will, include adopted children, is treated in a note in 27 L. R. A. (N. S.) 1158.

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STONE, J. The question presented by the bill of complaint in this case is the construction of the granting clause of a certain deed therein described. No question is raised by the pleadings as to the jurisdiction of equity in the case or as to the practice. The history of the transactions involved is as follows:

The complainant and her husband, John A. Ultz, being the owners by the entireties of the E. ½ of the S. E. ¼ of section 19, town 7 south, range 8 west, Branch county, Mich., excepting one acre for burying ground, they on the 17th day of February, 1892, conveyed the said land to Ida A. Ultz Upham, one of their five children, by deed duly delivered, which deed contained the following provision:

"And by these presents do grant, bargain, sell, remise, release, alien and confirm unto the said party of the second part, for her lifetime only, and at her death to her legal heirs, excepting her present husband, Oscar J. Upham, their heirs and assigns, the intention of this instrument being to create a life estate only in said second party, and remainder in said second parties heirs, excepting therefrom her husband, also reserving from said conveyance a life estate in said first parties."

The habendum clause in said deed reads as follows:

"To have and to hold said premises as above described with the appurtenances unto the said party of the second part, and to her heirs and assigns as above set forth."

The covenants of seisin and against incumbrances are in the usual form, and the covenant as to possession is in the following words:

"And that the above bargained premises in the quiet and peaceable possession of the said party of the second part, her heirs and assigns, as above set forth, against all and every person or persons, lawfully claiming or to claim the whole or any part thereof, they will forever warrant and defend."

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On the same day, to wit, February 17, 1892, Ida A. Ultz Upham executed and delivered a life lease of said above-described premises to John A. Ultz and Sarah I. Ultz, and the survivor of them; the granting clause of said instrument reading as follows:

"Does by these presents, grant, bargain, sell, remise, release and forever quitclaim unto the said parties of the second part, during the lifetime of both of said second parties, and at the death of both of said second parties to revert to said first party, heirs and assigns. The survivor of said second parties to have sole use during lifetime."

The habendum clause in said instrument reads as follows:

"To have and to hold the said real estate to the said parties of the second part, and to their assigns, to the sole and only proper use, benefit and behoof of the said parties of the second part, and assigns, during their lifetime as aforesaid."

The expressed consideration in each of said deeds was one dollar.

No child was born to Ida A. Ultz Upham during her lifetime. On August 16, 1909, Oscar J. Upham and Ida A. Ultz Upham regularly adopted under the statute a child named Charles Sturm; the said child thereafter being known as Charles Upham, who is one of the defendants herein.

John A. Ultz died January 16, 1911. Ida A. Ultz Upham died testate on December 2, 1911, and in and by her last will and testament made and constituted her husband, Oscar J. Upham, sole legatee and devisee of all her estate, both real and personal, and such will has been duly admitted to probate.

Upon the hearing evidence was offered on behalf of complainant and received against the objection of the defendants, tending to show that John A. Ultz and Sarah I. Ultz, the grantors, intended to limit the

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grant or remainder to themselves, if living, at the time of the death of Ida A. Ultz Upham, and, if not so living, to her brothers and sisters.

It was and is the claim of complainant that the words "legal heirs," used in the granting clause, and the word "heirs" in the habendum in the deed from John A. and Sarah I. Ultz to Ida A. Ultz Upham, were used in their customary and ordinary sense and did not include "contract heirs" or "adopted heirs," and that complainant, being the mother and only surviving parent of Ida A. Ultz Upham at the time of her decease, became and was entitled to the property in question under the statute of descent then in force. From a decree in favor of complainant, the defendants have appealed.

On the part of the defendants it is not claimed that either of them acquired any title to the lands in question under said will, but it is claimed that Charles, the adopted child of the said Oscar J. Upham and Ida A. Ultz Upham, is a legal heir within the meaning of the deed executed to Ida A. Ultz Upham and as such took the remainder limited to the heirs of Ida A. Ultz Upham on the death of the latter, subject to the life estate of Sarah I. Ultz, the complainant, and that the deed and life lease should be construed together. It is also urged by complainant that the first deed referred to was testamentary in character. We cannot agree with this claim of complainant. The instrument was, in our opinion, a deed, taking effect on delivery, vesting a life estate in Ida A. Ultz Upham, and at her death the estate to go to her legal heirs, subject to the life estate of the first parties.

Section 8780, 3 Comp. Laws (4 How. Stat. [2d Ed.] § 11640), relating to the adoption of children, contains the following language:

"And the person or persons so adopting such child, shall thereupon stand in the place of a parent or

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parents to such child in law, and be liable to all the duties and entitled to all the rights of parents thereto, and such child shall thereupon become and be an heir at law of such person or persons, the same as if he or she were in fact the child of such person or persons."

It being conceded that Charles Upham was legally adopted by Ida A. Ultz Upham and her husband, Oscar J. Upham, did he not thereupon become the "legal heir" of Ida A. Ultz Upham? We think so. Counsel for complainant have called attention to the statute of descent and claim that, at the death of Ida A. Ultz Upham, Charles could not inherit as her heir under the statute and terms of the deed. We are of opinion that the very language of the adoption statute refutes such claim for the reason that he "thereupon becomes an heir at law of such person or persons, the same as if he or she were in fact the child of such person or persons." Language could not well be stronger. We can see no difference between "an heir at law" and a "legal heir."

This view is in accord with the holding of the supreme court of Illinois in *Butterfield* v. *Sawyer*, 187 Ill. 598 (58 N. E. 602, 52 L. R. A. 75, 79 Am. St. Rep. 246). The statute of that State provided that an adopted child should be regarded as if it had been born in lawful wedlock for the purposes of inheritance "and other legal consequences and incidents of the natural relation of parents and children." A deed from B. to his daughter conveyed to her a life estate, with remainder to her child or children, and in default thereof to her "heirs generally," forever. The daughter died without children except an adopted son. It was held that such adopted son would take the fee simple, under the terms "heirs generally," in preference to the collateral heirs of the daughter. The court there said:

"It is earnestly insisted on behalf of appellants that

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the grantor by the term 'heirs generally,' meant 'collateral heirs,' but we find no warrant in the deed for so holding. The deed itself does not show that he used the language 'heirs generally' in any other than its commonly accepted legal sense. To hold otherwise is to enter the field of speculation as to his intentions, which is not permissible. In giving construction to deeds we are confined to the terms of the instrument itself, the object being to ascertain the intention of the grantor as expressed by the language used and not the unexpressed purpose which may at the time have existed in his mind. Where there is no ambiguity in the terms used, or where the language used has a settled legal meaning, the instrument itself is the only criterion of the intention of the party"—citing cases.

Less latitude is allowed in the construction of deeds than in the construction of wills. In a deed the word "heirs" in a general comprehensive sense includes all who stand in a relation to the ancestor that will entitle them to inherit on his death, and it includes an adopted child, placed by the statute on an equality with children by birth for the purpose of inheriting from the adopting parent. *Wallace* v. *Noland,* 246 Ill. 535 (92 N. E. 956, 138 Am. St. Rep. 247).

Counsel for complainant have cited in support of their position *Morrison* v. *Sessions,* 70 Mich. 297 (38 N. W. 249, 14 Am. St. Rep. 500). An examination of that case will show that it involved the construction of a will, and the court was able from the surrounding circumstances, which were peculiar and unusual, to arrive at what was actually in the mind of the testator. Speaking of the testator, the court said:

"But he left a will, and the only question is the proper construction of that will. The cardinal principle in the interpretation of wills is to arrive at and carry out the intention of the testator if it is lawful."

We think that the question here presented was not passed upon in that case. It should be borne in mind

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that nothing is claimed for the will of Ida A. Ultz Upham in the instant case. Defendant Charles Upham does not claim under the will but under the deed of February 17, 1892. *Reinders* v. *Koppleman*, 94 Mo. 338 (7 S. W. 290), referred to in the *Morrison Case*, was also a case involving the construction of a will.

Neither is the instant case controlled by *Van Derlyn* v. *Mack*, 137 Mich. 146 (100 N. W. 278, 66 L. R. A. 437, 109 Am. St. Rep. 669, 4 Am. & Eng. Ann. Cas. 879). In that case it was held that the adoption statute does not make such children heirs of the kindred of the persons adopting them. That case, however, is instructive upon the subject we are considering and shows that the adoption statute gives power to the child to inherit from the adopting parent. It also shows that the apparent inharmony in the cases in the different States may be explained by the varying statutes. As was said in *Helms* v. *Elliott*, 89 Tenn. 451 (14 S. W. 931, 10 L. R. A. 535):

"The law of adoption arbitrarily establishes for the adopted child the relation of heir and next of kin to the adopting parent; but it does not establish such a relation to the descendants of the adopting parent."

Applying the familiar rule of *Jacobs* v. *Miller*, 50 Mich. 119 (15 N. W. 42), and *Bolio* v. *Marvin*, 150 Mich. 82 (89 N. W. 563), that in the construction of a deed the intent of the grantor is to be gathered from the whole instrument, that the language employed is to be taken most strongly against the grantor, and that the terms of a deed must be given their legal effect, we are constrained to hold that the premises in question are owned in fee by the defendant Charles Upham subject to the life estate of complainant therein.

The decree of the court below is reversed, and bill of complaint dismissed, and a decree will be entered

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here in accordance with the prayer of the defendant Charles Upham, and the views herein expressed. The defendants will recover their costs of the complainant to be taxed.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, OSTRANDER, and BIRD, JJ., concurred.

PEOPLE *v.* SMITH.

1. INTOXICATING LIQUORS — INDICTMENT AND INFORMATION — COUNTS—ELECTION—RETURN OF JUSTICE.

   The trial court, in a prosecution on an information embracing two counts, the first for selling intoxicating liquor to an habitual drunkard, and the second for selling to a posted person, was not in error in denying a motion to quash the information because the justice of the peace before whom respondent was examined refused to specify in his return on which count he bound over the accused, who, at the trial, asked for and obtained an election on which count the prosecutor proposed to proceed.

2. SAME—COMPLAINT—CRIMINAL LAW—PLEADING.

   It was sufficient to charge the offense in the language of the statute creating the offense. 2 Comp. Laws, § 5391 (2 How. Stat. [2d Ed.] § 5067).

3. CRIMINAL LAW—TRIAL—REQUESTS—REFUSAL.

   In marking respondent's requests to charge "refused, except as covered in the general charge," the circuit judge sufficiently complied with the statute which requires the court to mark such requests "given" or "refused," error being assignable on the charge and refusals to instruct without taking specific exceptions under Act No. 52, Pub. Acts 1901 (5 How. Stat. [2d Ed.] § 12960). See 3 Comp. Laws, § 10245 (4 How. Stat. [2d Ed.] § 11839).

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4. SAME—TRIAL—OPENING STATEMENT—INTOXICATING LIQUORS.
Upon the trial of a prosecution for selling liquor to an habitual drunkard, the court committed reversible error in refusing to counsel for respondent the privilege of stating his theory of the law to the jury in opening his defense.

Exceptions before sentence from Ingham; Wiest, J. Submitted June 13, 1913. (Docket No. 126.) Decided October 1, 1913.

William Smith was convicted of selling intoxicating liquor to an habitual drunkard contrary to statute. Reversed.

Grant Fellows, Attorney General, *Charles H. Hayden*, Prosecuting Attorney, and *William C. Brown*, Assistant Prosecuting Attorney, for the people.

L. B. Gardner, for respondent.

BROOKE, J. The information in this case contained two counts. Under the first the respondent was charged with having made an illegal sale of intoxicating liquor to one Edwin Bowman, a person in the habit of getting intoxicated. 2 Comp. Laws, § 5391 (2 How. Stat. [2d Ed.] § 5067). Under the second count respondent was charged (the same act being counted upon) with having made an illegal sale of intoxicating liquor to said Bowman; respondent having been theretofore—

"Forbidden in writing by Gottlieb Reutter, mayor of said city of Lansing, to sell, furnish, and give away any spirituous, malt, brewed, fermented, and vinous liquor to said Edwin Bowman."

The first assignment of error is based upon the refusal of the court to quash the information. Some 19 reasons were urged why the motion should be granted. We notice only two:

First. "Because the justice of the peace refused

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to specify in his return to the circuit court upon which count of the complaint and warrant he would or did bind the respondent over to the circuit court upon."

It is respondent's contention that he should not have been held for trial upon both counts, citing *People* v. *Keefer*, 97 Mich. 15 (56 N. W. 105), and *People* v. *Rohrer*, 100 Mich. 126 (58 N. W. 661). Neither case is authority for the proposition stated. At the circuit respondent was entitled to have the prosecutor elect upon which count he would proceed, and this was done; the prosecutor designating the first count.

Second. "Because the complaint, warrant, and information do not charge the respondent with having sold intoxicating liquor to a person with intent to violate the law."

The information in the case at bar is essentially framed in the language of the statute creating the offense. In a prosecution under a statute it is sufficient, as a general rule, to charge the commission of the offense in the language of the statute. 3 Comp. Laws, § 11924 (5 How. Stat. [2d Ed.] § 15095); *People* v. *Kennedy*, 105 Mich. 75 (62 N. W. 1020), and cases cited.

Assignments of error numbered from 2 to 6, inclusive, relate to the admission or exclusion of evidence. We are of opinion that they are all without merit and require no discussion.

Assignments of error numbered from 8 to 27, inclusive, relate to the refusal of the court to charge as requested and to the charge as given. After a careful perusal of the charge, we conclude that it was a correct exposition of the law governing the case; that it covered all of respondent's requests which should have been given; and that it carefully preserved all of respondent's rights.

Assignment of error No. 28 is based upon the fact

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that the trial judge marked the requests of respondent, "Refused except as covered in the general charge," instead of marking each request "refused" or "given," as required by the statute. 3 Comp. Laws, § 10245 (4 How. Stat. [2d Ed.] § 11839). We think what was done a sufficient compliance with the statute, in view of the fact that error may now be assigned upon the charge or refusal to charge, without the necessity of taking an exception. Act No. 52, Pub. Acts 1901 (5 How. Stat. [2d Ed.] § 12960).

This leaves for discussion only assignment of error No. 7, which is based upon the following occurrence during the trial: In opening for the defense counsel said:

"*Mr. Gardner:* May it please your honor and gentlemen of the jury, this is a charge made under a certain statute which makes it a misdemeanor for a person who is engaged in the sale of intoxicating liquors to sell to a person who is in the habit of getting intoxicated. There are some questions stated here about a notice. The count in reference to that has been eliminated by his honor and the prosecuting officer. So the only question that comes before you is: Did William Smith, the respondent, on the 7th day of September last, sell intoxicating liquors to this man, Edwin A. Bowman? The question further is: If he did, was he a person in the habit of getting intoxicated? Now, in order for me to state clearly the facts that we will bring out in the defense, it is proper for me to state to you what I understand the law to be in reference to that, so as to direct your attention specifically to the facts, and by and by his honor will tell you just what the law is, and it is for him to tell you.

"*The Court:* I think, Mr. Gardner, that in your opening statement of what you expect to prove you should confine yourself to a statement of the facts you expect to prove. It is not necessary at this time to state any law.

"*Mr. Gardner:* Well, isn't it necessary, if your honor will bear with me, I have a right to state, have

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I not, what it is necessary for the prosecutor to prove, and then we will state what we expect to prove as a refutation of it?

"*The Court:* You should confine yourself at this time to a statement of the evidence you intend to offer.

"*Mr. Gardner:* I would like to note an exception to that.

"*The Court:* This is not an argument.

"*Mr. Gardner:* No.

"*The Court:* You may state to the jury the facts you expect to show."

This ruling, it is insisted on the part of respondent, constitutes reversible error.

Three cases are cited and relied upon: *Fosdick* v. *Van Arsdale,* 74 Mich. 302 (41 N. W. 931); *Prentis* v. *Bates,* 93 Mich. 234 (53 N. W. 153, 17 L. R. A. 494); and *Edwards* v. *Three Rivers Common Council,* 96 Mich. 625 (55 N. W. 1003). In the first of these cases, as in the case at bar, counsel for defendants—

"Proceeded to state the defendants' case to the jury and during the opening proceeded to state the law governing the defendants' case, and upon which the defense was based, whereupon the counsel for the plaintiff interposed an objection, and the said court sustained the objection, stating that the law would come from the court in due time."

Error having been assigned upon this ruling, this court, speaking through Justice MORSE, said:

"We are not able, from this meager statement in the record, to know whether error was committed or not by this action of the circuit judge. But counsel have the right in stating their case to the jury at the opening to briefly set forth what points of the law they rely upon, and the nature of the testimony they propose to introduce to support such points. It is true the law is to be given by the court; but, as it is not given in most cases until the testimony is ended, and the counsel have summed the same up in support of their case before the jury, the counsel

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have the right, both in opening the case to the jury, before the testimony to support their case is offered, and when closing the argument, after the testimony is in, to state to the jury that they claim the law to be thus and so, and that they shall request the court to so instruct them. * * * They have the undoubted right to state so much of the law, as they claim it to be, as may enable them to lay before the jury an intelligent idea of the force, effect, and bearing of the testimony upon their case, either before or after said testimony is in the case."

In the case of *Prentis* v. *Bates, supra,* counsel had been permitted in his opening statement to the jury to state his views upon the law. It was urged in this court that the privilege had been abused and that the law as stated by counsel was not sound. Justice MONTGOMERY, speaking for the court, said that it was evident counsel had acted in the utmost good faith, and, under the authority of *Fosdick* v. *Van Arsdale,* was within his rights. He adds:

"Nothing short of bad faith or a gross misconception of what is admissible, resulting in bringing to the attention of the jury matters wholly irrelevant, and of a nature calculated to create so profound an impression that the charge of the court cannot eliminate the prejudice produced, will justify an appellate court in vacating a judgment on such grounds."

The case of *Edwards* v. *Three Rivers Common Council, supra,* follows and quotes from *Fosdick* v. *Van Arsdale,* and the case was reversed because of two errors, one of which was the ruling of the trial court that counsel should not "state what the law is."

In the case of *Scripps* v. *Reilly,* 38 Mich. 10, this court held the opening to have been so unfair and unjust as to constitute legal error; but in *Porter* v. *Throop,* 47 Mich. 313 (11 N. W. 174), it was held, though with apparent difficulty, that the opening argument, though erroneous, did not justify a reversal. In that case Justice COOLEY said:

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"We agree that the trial court must in its discretion supervise the opening of the case by counsel, and that in general a judgment is not to be disturbed merely because in our opinion the course which the opening was suffered to take was calculated to do injustice. In a variety of cases the action of the trial court must be final even when we are satisfied it is wrong; for the simple reason that in such cases the final decision is left by the law to that court."

The rule may be deduced from the foregoing excerpts and it requires no restatement here. There can be no doubt that it was violated in the case at bar. The right and duty of the trial court, in the exercise of a sound discretion, to supervise and control statements of counsel is not questioned.

The conviction is set aside, and a new trial granted.

STEERE, C. J., and MOORE, MCALVAY, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

DRUCK *v.* ANTRIM LIME CO.

1. MASTER AND SERVANT—EMPLOYMENT—NEGLIGENCE—EVIDENCE.
   A verdict for injuries sustained by plaintiff, who claimed he was hurt while in the employ of defendant corporation, is affirmed on his testimony tending to show that he was employed by defendant's president and another agent, and that defendant admitted the existence of the relation in a certain letter or exhibit, though defendant offered proofs to show that he was in the service of an independent contractor. The evidence presented a question of fact for the jury.

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2. SAME—TRIAL—ARGUMENT.

Where plaintiff's counsel, in his argument to the jury, said that if they thought plaintiff was entitled to recover, he believed they would take the burden of his support off the taxpayers of the county and place it upon defendant, where it belonged, and no ruling on the objectionable language was secured from the court, whose attention was not directed to it, a new trial was correctly denied on motion of defendant alleging the improper conduct of counsel.

3. SAME—PERSONAL INJURIES—TERMINATION OF EMPLOYMENT.

Nor was it erroneous to instruct the jury that if, as plaintiff claimed, he was engaged by the president of defendant company, who was also general manager, and received his pay from the corporation, and, so long as he worked there, he had no notice or information that his employment had terminated or changed to that of and under an independent contractor, the relation of employee and employer continued to exist.

4. SAME—CHARGE—INSPECTION—MINES AND MINING.

In charging the jury relative to the duty of plaintiff's employer to inspect the face of the cliff which the men were engaged in blasting, the court correctly instructed them that it was the custom after a blast was fired to examine the face of the cliff and warn any of the workmen who might undertake to work at or near the place of the blast or within dangerous proximity thereto, before defendant had inspected it, and that under the undisputed evidence the plaintiff had received no warning on the occasion of the accident and the charge was not misleading or open to the objection that it left the jurors to infer that a custom had prevailed to inspect the entire face of the cliff, instead of the portion likely to be affected by the blast.

5. SAME—WEIGHT OF EVIDENCE—NEW TRIAL.

A verdict must be clearly against the great weight of the evidence to require the Supreme Court to reverse the decision of the circuit judge in denying a motion for a new trial.

Error to Emmet; Shepherd, J. Submitted June 16, 1913. (Docket No. 102.) Decided October 1, 1913.

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Case by William F. Druck against the Antrim Lime Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Pailthorp & Hackney (Henry S. Sweeny, of counsel), for appellant.

Maxwell W. Benjamin, for appellee.

STONE, J. This case is before us for the second time. When first here it will be found reported in 167 Mich. 154 (132 N. W. 492), where there will be found a full statement of the case. A comparison of the two records will show that there is no material difference in the testimony adduced upon the two trials, and it is not deemed necessary to restate the case. Upon the first trial the circuit judge directed a verdict and judgment for the defendant, upon the ground of assumption of risk by the plaintiff. In reversing the case, we said:

"The most favorable statement for the defendant that can be made from this record is that whether the plaintiff was in the employ of the defendant, and whether the plaintiff assumed the risk, or was guilty of contributory negligence, were questions for the jury under proper instructions."

A second trial has resulted in a verdict and judgment for the plaintiff in a substantial sum.

The defendant has brought the case here upon writ of error, and by appropriate assignments of error it claims the following errors:

(1) The court's refusal to direct a verdict for the defendant at the close of the evidence.

(2) Improper and prejudicial remarks to the jury by counsel for plaintiff.

(3) Error made by the court in its charge to the jury. *(a)* The hiring of plaintiff by Nathan Jarman acting as president of the defendant company. *(b)* The custom to inspect the cliff after each blast.

(4) Error in denying the motion for a new trial.

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First. Upon the first proposition it is the claim of the appellant that the relation of master and servant was not established between the plaintiff and the defendant company, but that plaintiff was in the employ of David Jarman, an independent contractor. There was a sharp conflict in the evidence upon this subject, and we are still of the opinion that it presented a question of fact for the jury. Upon this subject the court, at the request of the defendant, submitted to the jury the following special question:

"Was the plaintiff in the employ of the Antrim Lime Company, the defendant, upon the 19th day of December, 1908?"

The jury answered this question in the affirmative.

That there was evidence tending to support the claim of the plaintiff that he was in the employ of the defendant we need only refer to the record. About six months after plaintiff's injury, the defendant took measures to provide him with an artificial limb from Winkley Artificial Limb Co., of Minneapolis, Minn., and the following letter was written to that company by defendant:

"ANTRIM LIME COMPANY, GENERAL OFFICE MICHIGAN TRUST BUILDING, GRAND RAPIDS, MICHIGAN.
"PETOSKEY, MICHIGAN, June 28, 1909.
"WINKLEY ARTIFICIAL LIMB CO.,
"Minneapolis, Minn.
"*Dear Sirs:*
"I enclose herewith a receipt for W. F. Druck's signature, when he receives the artificial leg from you. I intended to have him sign it before he left here for Ludington, but did not have it ready. When you send your bill for the leg, please send the enclosed receipt with the signature and two witnesses.
"You can send the bill to me, or to our general office Grand Rapids (Mich. Trust Bldg.), and a check will be sent you in return.
"Our understanding is that we pay $100.
"Very truly yours,
"ANTRIM LIME COMPANY,
"By N. JARMAN, Pres. and Mgr."

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The receipt referred to in said letter, and which was inclosed in it, contained the following language:

"Whereâs, I, W. E. Druck, did, on the nineteenth day of December, A. D. 1908, meet with an accident while employed by the Antrim Lime Co. and engaged at work in and about the limestone quarry at Petoskey, Michigan, which resulted in the loss to me of my right leg, and as said Antrim Lime Company, as a token of their appreciation and esteem for my services while in their employ, and upon consideration of the covenants and conditions hereinafter mentioned, has agreed to purchase for me an artificial leg to be by me worn upon the stump of the limb lost as aforesaid," etc.

(Here followed a discharge and release of any and all claims, demands, damages, and causes of action against the defendant by the plaintiff.)

This receipt was not signed by the plaintiff.

Not only did the plaintiff testify that he was directed in his work by Nathan Jarman, the president and manager of the defendant, but he also testified that he was paid by him. Upon the subject of the hiring, he also testified on cross-examination as follows:

"I stated in my direct examination that I was employed by Sherman Cassell. I say that he employed me to work for the Antrim Lime Company. * * * I have stated positively that Mr. Cassell was foreman of the Antrim Lime Company. I swear to that, because Mr. Nathan Jarman said it was the Antrim Lime Company that was running the kiln. In the very first place, the first man I spoke to of working anywhere was Mr. Nathan Jarman, working at the kiln; he said as quick as there is an opening, why, they would see about giving me work. I had this conversation with Mr. Nathan Jarman about two weeks before I commenced work. It was not brought up on the other trial.

"*Q.* Wasn't you asked, upon the other trial, who hired you?

"*A.* Yes, sir; Mr. Cassell hired me, and I testify to it now. I don't think that I testified at that time

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of having two conversations with Mr. Cassell. Not to my recollection did I talk with Mr. Cassell about going to work there at some time previous to the time he told me I might come. The only conversation I had with Sherman Cassell was upon the day that he came there. At the time I had the conversation with Mr. Nathan Jarman, I went over to see him. I seen him milking his cow in his pasture field. I asked him if there would be any show working for him, and he said they were full now, but if there was an opening, why, he would give me a show.

"*Q.* Now just repeat the conversation, if you can, you had with Mr. Jarman, and what did you say to Mr. Jarman, and what did he say to you?

"*A.* I asked him—I was out of employment; the paper mill quit working—and I wanted to know if there was any show to work for the Antrim Lime Company or at the kiln, and he said at the present time they were full. 'But,' he says, 'if later on there is a show, we will give you a show.' Later on Mr. Cassell came and saw me. Mr. Cassell never told me he was the foreman of the Antrim Lime Company. Some of the men working there told me he was the foreman of the Antrim Lime Company."

The plaintiff had been laid off from his work in the summer of 1908. The wife of plaintiff testified to the following conversation with Nathan Jarman:

"I am acquainted with Nathan Jarman. He came to my place of residence in the month of August. My husband was working at the lime kiln before Mr. Jarman came to my place. I remember my husband being laid off some time before Mr. Jarman called. He was laid off a week or such a matter. He (Mr. Jarman) called to see Mr. Druck—asked for Mr. Druck. Mr. Druck was not there. I told Mr. Jarman that Mr. Druck would soon be there. Mr. Jarman said he wanted Mr. Druck to come to work at the Antrim Lime Company.

"*Q.* Said he wanted him to come to work for the Antrim Lime Company?

"*A.* Yes, sir; he said he wanted him to go to work the next morning. Mr. Druck did go to work the

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next morning. He continued that work from that time down to the time of his injury."

It is true that this testimony, and all like testimony, was contradicted on behalf of the defendant. But that a question of fact was presented for the consideration of the jury seems too clear for controversy.

Under this head it is also claimed that the plaintiff assumed the risk of his employment, and that a verdict should have been directed for the defendant upon that theory. What we said in our former opinion is an answer to this proposition.

Second. Improper and prejudicial remarks to the jury by counsel for plaintiff. The language complained of was as follows:

"If you think that the plaintiff is entitled to recover, I am satisfied that you will take this burden off from the taxpayers of this county and put it upon the Antrim Lime Company, where it belongs, so that he will not have to depend upon charity, and so that he will not have to stand on the street corners selling shoe laces and pencils for meager earnings to buy bread for himself and family."

The plaintiff had testified without objection that during the three years since his injury he had been able to earn only about $50. This he had earned by selling lead pencils, shoe laces, and a few books, and that he was not able to do manual labor, and that he had been supported chiefly by charity, and by the aid of the city or county.

The above-quoted argument of counsel was excepted to; but there is nothing in the record to indicate that the matter was called to the attention of the court, or that the court was asked to rule upon it. The matter was urged as one of the grounds in support of the motion for a new trial. In his reasons for overruling the motion, the circuit judge, in referring to the subject, said:

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"The court is unable to recall the remarks as alleged, and, while he has no doubt that they were made as alleged by counsel for defendant, he does not feel that they were so prejudicial as to be proper grounds for a new trial."

We think that the court did not err in reaching this conclusion, in view of the testimony and circumstances.

Third. Alleged errors in the charge. *(a)* The following language of the charge is complained of:

"Mr. Druck claims that he was hired by the president of the company; that he was told to go to work there by the president of the company, and never received any notice but what he was at work for the company; and that he received his pay from the president of the company. * * * On the other hand, Mr. Druck claims that he was hired by the president of the company, acting in his capacity as president or general manager of the company, and that as long as he was employed there he, Druck, had no notice or information that he was not in the employ of the company. If you find that Mr. Druck was so employed, that is, hired by Nathan Jarman, acting as president of the company, to work for the company, he remained and was the employee of the company until he had notice of the arrangement, or independent contract, which the defendant company sets up as existing between itself and Mr. David Jarman."

In view of the testimony contained in the record, a part only of which we have quoted, and of the rule of law announced in *Tousignant* v. *Iron Co.*, 96 Mich. 87 (55 N. W. 681), we are of opinion that there was no error in that part of the charge here complained of.

(b) Error is also assigned upon the following part of the charge:

"It was the custom there, after a blast had been fired, to examine the face of the cliff, and to warn any of the workmen who might undertake to work at or near the place of the blast, or within dangerous proximity of the place of the blast—if they undertook

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to do such work before the cliff had been inspected, it was the custom to warn them against going there. In other words, it was the custom to inspect the cliff and bar out loose pieces of rock, before workmen were allowed or permitted, without warning, to work under the cliff. No warning was given Mr. Druck, according to his testimony, and no witness claims that he was warned."

It is the contention of appellant that the only custom that the record shows was that after every blast the cliff was inspected to a point about 20 feet, at the farthest, on both sides of the point of blast, and that the effect of a blast was never known to reach beyond 20 feet on both sides of the point of blast, and that custom had established an inspection of the cliff to these points after each blast.

Upon the subject of inspection Sherman Cassell, the foreman, testified that after a blast, and before the men were permitted to return to work, he generally took a man or two with him, and went on top and saw that all the loose stuff was poked off, and so below; that he always did that; that some of the men might return to the ledge and work in other parts of the quarry where it was not dangerous; and that he was in the habit of warning men from the dangers of loose rock. It is true that this witness testified that in his judgment a blast set off there, where they had five or six holes drilled in, and filled with dynamite, would not affect or disturb the face of the ledge more than 15 feet from each side of the end of the battery holes, and all the way to the top; that he did not think there would be very much vibration across the entire ledge. Other witnesses varied the distance affected, and all testified that after a blast it was the custom to examine the face of the ledge to determine whether there was any loose rock or not.

The plaintiff testified that he was injured by a falling rock at a point about 50 feet from where a blast

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had taken place the afternoon of December 18th, the day before. Upon this question the main contention of defendant was that there had been no blast the day before, and hence no warning. Whether there had been any blasting done the day before was, on defendant's motion, made the subject of a special question to the jury, and they answered that there was such a blast on December 18th.

We think that the trial court in the charge proper confined the place of inspection at or near the place of blasting, or within dangerous proximity to the place of blasting, and did not leave the jury to infer that it was the custom to inspect the entire cliff. We discover no error in that portion of the charge.

Fourth. Did the court err in denying the motion for a new trial? The grounds of the motion, not already covered, were that the verdict was against the weight of the evidence, and was not justified by the preponderance of the evidence. Upon these points the circuit judge, in giving his reasons for denying the motion, said:

"The weight of the evidence is for the determination of the jury; the court being of the opinion that there was sufficient evidence to go before the jury, upon which to render a verdict, and that the same was submitted to them under proper instructions, at least under instructions, as to which the defendant can find no objection, in that it was sufficiently favorable to it, and that the verdict of the jury must stand."

A careful examination of the entire record leads us to agree with this conclusion. Upon the main questions involved, the law of the case was settled when it was first before us. The learned trial court followed the opinion of this court in submitting the questions of fact to the jury. Upon the two main questions involved, the defendant by submitting special questions to the jury must be held bound by the answers given to such questions. *Stevens* v.

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Rose, 69 Mich. 259-264 (37 N. W. 205); *Swanson* v. *Power Co.*, 113 Mich. 603 (71 N. W. 1098).

The rule is well settled that this court will only reverse a case upon the question of the weight of the evidence when the verdict is against the overwhelming weight of the evidence. The verdict must be clearly against the great weight of the evidence to require this court to overrule the decision of the circuit judge in refusing a new trial. *Gardiner* v. *Courtright*, 165 Mich. 54, 62 (130 N. W. 322); *Fike* v. *Railroad Co.*, 174 Mich. 167 (140 N. W. 592). We cannot say that the verdict in this case was against the overwhelming weight of the evidence, in the light of the record.

We find no reversible error in the record, and the judgment of the circuit court is affirmed.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, OSTRANDER, and BIRD, JJ., concurred.

LUNDE *v.* DETROIT UNITED RAILWAY.

1. TRIAL — CROSS-EXAMINATION — RECROSS-EXAMINATION — MARRIAGE—EVIDENCE.

On recross-examination in a negligence case, defendant's counsel was rightly permitted to ask plaintiff about her marriage and to show that it was a common-law relation, where he had been prevented from inquiring into the matter in his cross-examination, but plaintiff's attorney had shown on redirect that she was recognized by the courts in certain litigation as the common-law wife of a decedent.

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2. WITNESSES—CROSS-EXAMINATION.

The extent of cross-examination to show the true character of a witness, being left mainly to the discretion of the trial court, there was no prejudicial error in permitting defendant's counsel to show that plaintiff had conducted a house of doubtful reputation. The examination was not open to the objection that counsel was attempting to impeach the witness by showing unchastity.

3. NEGLIGENCE—DAMAGES—INJURIES TO PERSON.

Evidence that plaintiff, who sustained injuries in boarding a street car, had at one time lived in a house of ill repute, but had suffered no infection or other disease from which her injuries might have arisen, was insufficient to justify the court in charging the jury that plaintiff could not recover if her former mode of life and not the fall caused the condition from which she suffered.

Error to Wayne; Hally, J. Submitted June 19, 1913. (Docket No. 35.) Decided October 1, 1913.

Case by Emily Lunde against the Detroit United Railway for personal injuries. Judgment for defendant and plaintiff brings error. Reversed.

Thomas W. Payne (George W. Coomer, of counsel), for appellant.

Corliss, Leete & Moody (Frederic T. Harward, of counsel), for appellee.

KUHN, J. This cause, which on the trial below resulted in a verdict and judgment for the defendant, arises from a claim made by plaintiff that she sustained injuries from being thrown to the pavement by the starting of one of defendant's cars as she was about to board it at the corner of Michigan avenue and Shelby street in the city of Detroit. The errors relied upon on this appeal relate to the cross-examination of the plaintiff and the charge of the court.

Counsel for defendant, on cross-examination, sought to show her relations with a man named Lori-

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mer, which testimony was excluded upon objection by plaintiff's counsel. On redirect examination the following occurred:

"*Q.* You were the wife of Thomas Lorimer, that died sometime in 1903, were you?

"*A.* 1895 it was that he died.

"*Q.* You had lived with him how many years?

"*A.* I had lived with him, yes, practically lived with him, for the last 25 years.

"*Q.* And the courts of the State of Michigan—

"*Mr. Harward:* You are aware, are you, Mr. Payne, that I have not gone into that on cross-examination? The court ruled I should not go into that on cross-examination. It was ruled out.

"*The Court:* What is the objection?

"*Mr. Harward:* Your honor ruled the testimony out, when I inquired about her relations with Thomas Lorimer. Now he is going into it on his redirect examination.

"*Mr. Payne:* Go ahead.

"*The Court:* Proceed. I do not understand there is any objection.

"*Q.* The courts of the State, after a lawsuit with relatives of Thomas Lorimer, decided that you were his wife?

"*A.* Yes, sir.

"*Q.* It is a matter of court record that you are a married woman for the last 30 years practically?

"*A.* Practically, yes, sir.

"*Q.* You are 53 years old now?

"*A.* Yes, sir."

Recross-examination:

"*Q.* You say you were the wife of Thomas Lorimer?

"*A.* Yes, sir.

"*Q.* After Thomas Lorimer died, you sued the estate, and claimed you were his common-law wife, did you?

"*Mr. Payne:* I object to this cross-examination.

"*Mr. Harward:* He brought it out himself.

"*Mr. Payne:* My examination was confined entirely to show that she was a married woman, and the courts of this State made her a married woman,

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and the nature of the litigation that was carried on by any relatives in that matter. That is a matter of public record. I only put that in to show in view of this cross-examination something in her early life, that she was, according to the laws of this State, a married woman, was adjudged so by a jury and by the Supreme Court of this State.

"*The Court:* Take an answer.

"*Mr. Payne:* Note an exception.

"*Q.* You never had any marriage ceremony with Thomas Lorimer, did you?

"*Mr. Payne:* I object to it. It is a matter of public record, having been litigated in the Wayne circuit court and in the Supreme Court.

"*The Court:* Take an answer. Note an exception for plaintiff.

"*A.* I have to answer, Judge?

"*Mr. Payne:* Yes, answer the question.

"*A.* Why, no.

"*Q.* No. After he died you came in and claimed a third of his estate because you had lived with him, without a marriage ceremony, claiming you were his common-law wife, didn't you?

"*Mr. Payne:* I object to that, make the same objection in view of that litigation.

"*Q.* Is that true?

"*Mr. Payne:* If there is any question, Mrs. Lunde, that he puts to you that is not true on its face, say so. I don't know anything about this third or anything else. I am not familiar with this litigation myself. I will ask the stenographer to read the question.

"*Mr. Harward:* You want to object, or what do you want to do?

"*Mr. Payne:* Calling the witness' attention to a fact that does not in fact state the true state of facts, she is not obliged to answer it.

"*The Court:* Proceed, please. (Question read by reporter.)

"*A.* Yes, sir; I believe, according to the records on that, that is the claim.

"*Q.* That is what you did, isn't it?

"*A.* Yes, sir.

"*Q.* You were finally declared his common-law wife?

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"*A.* Yes, sir.
"*Q.* That is what you mean when you say you were married to Thomas Lorimer?
"*A.* Yes, sir; isn't that sufficient? Isn't that a marriage contract?
"*Q.* I am asking you, Is that what you mean when you say you were married to Thomas Lorimer?
"*A.* I have answered you. I answered you.
"*Q.* How did you answer?
"*A.* I answered you that I was married to Thomas Lorimer; yes, sir."

Exception is taken to this recross-examination. In view of the fact that the subject-matter of the examination was opened up by plaintiff's counsel on redirect examination, it was proper to allow the recross-examination.

On further cross-examination defendant's counsel showed that at one time plaintiff conducted a house of questionable reputation. It is urged that it was prejudicial error to allow the antecedents of the plaintiff and her former life to be brought before the jury. The extent of cross-examination for the purpose of showing the true character of the witness, so as to enable the jury to properly judge the weight to give the testimony, should be and is left to the discretion of the trial judge, and will not be reviewed unless this discretion is clearly abused.

There is a clear distinction between attempting to impeach a witness by showing a want of chastity and a cross-examination for that purpose. The former is not proper, while the latter, as has been said, is discretionary with the trial judge, and in the instant case we do not find that there was any abuse of such discretion. In the case of *Beebe* v. *Knapp*, 28 Mich. 53, 71, Justice CHRISTIANCY said:

"Beebe, having been, as it would seem, on cross-examination, asked how many times he had been married, said he had been married four times, that one of his wives was buried, and one of them at

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home; was then asked, 'Where are the other two?' This was objected to as irrelevant, the objection overruled, and exception taken. His answer was: 'I cannot tell; was first married 18 years ago.' He was then asked, 'How long did you live with that woman?' This was objected to, and the objection overruled, and the witness answered: 'Seven years. I have not lived with any other women besides these; not what I call living with them.'

"These questions do not appear to have been put for the purpose of founding upon them any other questions pertinent to the issue, or any other fact in his past life which might contradict any statement made by witness, or in any way tend to impair his credit, except the mere facts elicited in reference to the women referred to. I think the court would have wisely exercised its discretion in excluding the evidence. But on cross-examination the court must be allowed considerable latitude of discretion in permitting questions calculated to elicit any information as to the past life and conduct of the witness, and to enable the jury to see 'what manner of man he is,' and we cannot, therefore, say that it was error in law to permit these questions. See *Comstock* v. *Smith*, 20 Mich. 338."

See, also, *Threadgool* v. *Litogot*, 22 Mich. 271; *McBride* v. *Wallace*, 62 Mich. 451 (29 N. W. 75).

Before allowing this class of questions to be put to a witness, the court should be satisfied that they are asked by counsel in good faith, and in the case of *People* v. *Gotshall*, 123 Mich. 474 (82 N. W. 274), cited by plaintiff's counsel, a reversal was had because want of good faith on the part of counsel was apparent. In the case before us there can be no question of the good faith of counsel, because the witness admitted that she had lived in a house of evil reputation. In *Knickerbocker* v. *Worthing*, 138 Mich. 224, 238 (101 N. W. 540, 545), Mr. Justice MONTGOMERY, in speaking of the case of *People* v. *Mills*, 94 Mich. 637 (54 N. W. 488), also relied upon by plaintiff's counsel, said:

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"It was also held in *People* v. *Mills*, 94 Mich. 637 [54 N. W. 488], that it was not error to exclude the inquiry attempted in that case on cross-examination. The statement in the opinion is very brief, and, if understood as holding that the court may not, in its discretion, permit, on cross-examination, an inquiry into the past life of a female witness, and an inquiry as to her chastity, is misleading."

As to the charge of the court. The trial judge, in charging the jury, said:

"If you believe that the plaintiff's physical condition is caused by her former mode of living, and not by any injuries that she received at the hands of the defendant company, then you are not to allow her for such injuries."

This naturally assumes that there was evidence in the record that the injuries she claimed might have been caused by her former mode of living. The only testimony upon this question was that brought out on the cross-examination of Dr. Sanderson, one of the medical witnesses sworn by the plaintiff:

"*Q.* Would a woman's life, had she been perhaps a demimonde in her life—would that tend to prolapse the uterus?

"*A.* No, sir.

"*Q.* Sexual intercourse, no matter how frequent or promiscuous, would not affect the uterus—do you mean to say that?

"*Mr. Payne:* I want to object to all this. There is no time fixed any way. I want the time and the place placed on the record. Mr. Harward is trying to make out that she was a demimonde, as he calls her.

"*Q.* I said, would the life of a demimonde—I think I have got a right to ask him under the testimony in this case, and under the admissions of the plaintiff, your honor.

"*The Court:* You may proceed. Note an exception for the plaintiff.

"*Q.* I say, would the life of such a woman tend to affect her uterus in any way?

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"*The Court:* That question has been answered, I think.

"*Mr. Harward:* What?

"*The Court:* That question was answered, I think, by the doctor.

"*A.* It might not cause any injury to the uterus at all, unless it were an infection. There are no evidences or signs of such now, or of womb infection. There are no symptoms in the womb of infection. When I looked her over, there wasn't any evidence that there had been any infection, none whatever. Such a life has no effect on the organs that she complains of here, unless there is an infection, or pregnancy develops; the mere fact of intercourse does not injure the uterus at all. Of course, the uterus might be infected, or pregnancy might come on, and there is a child born or a miscarriage, and that might affect the uterus. Infections, gonorrhea, and such might cause prolapsus in a roundabout way by producing congestion of the uterus, an enlargement of the uterus. I have seen such caused in women. It is not a very frequent cause; but it is a cause.

"*Q.* From the inflammation set up the gonococcus?

"*A.* Yes, sir; but there is none in this case.

"*Q.* Well, that is a frequent cause, is it not?

"*A.* No, not a frequent cause. It has occurred; but it is not frequent.

"*Q.* I think that's all.

"*Mr. Payne:* Now, Doctor, you found no evidence of any diseases of any kind?

"*A.* No, sir; it is in a relaxed condition.

"*Mr. Payne:* That is all."

It appears from this testimony that there was no evidence that the plaintiff ever suffered from such disorders as a result of her past life which might have caused the injuries complained of. The evidence is clear that no such condition was discovered by the doctor. It was therefore improper to submit the question to the jury. In the instant case, as it is impossible to tell whether the jury disregarded this in arriving at their verdict, it was prejudicial error to submit it to them. 38 Cyc. p. 1638; *Clark* v. *Rail-*

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way Co., 149 Mich. 400 (112 N. W. 1121, 12 Am. & Eng. Ann. Cas. 559).

For this reason, the judgment of the trial court must be reversed, and a new trial granted.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ., concurred.

GORMAN *v.* PATRICK HIRSCH CO.

1. APPEAL AND ERROR—EQUITY—PARTIES—RAILROADS.
   In equitable proceedings by creditors of a railroad corporation for receivership, sale of the corporate property and distribution of the proceeds, after a sale under order of the court, the defendant railroad company had no interest in the proceeds, and its solicitor, having in writing consented as counsel of the receivers to the entry of the decree of distribution, making no objection to it in behalf of defendant, the latter could not appeal. OSTRANDER and MCALVAY, JJ., dissenting.

2. SAME.
   The allowance of solicitors' and receivers' fees by the trial court was discretionary and will not be reversed on appeal unless the discretion was abused.

3. SAME—SAVING QUESTIONS FOR REVIEW.
   Objections not brought to the attention of the lower court will not be considered.

Appeal from Monroe; Lockwood, J. Submitted November 7, 1911. (Docket No. 61.) Decided December 17, 1912. Rehearing denied November 5, 1913.

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Bill by Frank Gorman and others against the Patrick Hirsch Company, the Toledo, Ann Arbor & Detroit Railroad Company and others for the enforcement of mechanics' liens and other equitable relief. On petition of James L. Hosler and other creditors for distribution of funds derived from a sale under the order of the court a decree of distribution was entered. Defendant railroad company, certain intervening creditors and complainants appeal. Affirmed.

Ralph S. Holbrook, Claude R. Banker, and *Smith, Baldwin & Alexander,* for complainants.

E. R. Gilday, for defendant Toledo, Ann Arbor & Detroit Railroad Co.

MOORE, C. J. The record in this case covers 400 printed pages. The case is elaborately briefed. We think the following statement of facts, taken chiefly from the brief of the solicitors for the complainants, is justified by the record. We quote:

"This statement is largely taken from the opinion of Judge Lockwood. Prior to April 16, 1904, the Toledo & Northwestern Railway Company had been incorporated under the laws of the State of Ohio to construct and operate a railroad from the city of Toledo to the State line between the States of Ohio and Michigan, and the Michigan Traction Company had been organized under the laws of the State of Michigan to construct and operate a railroad from the State line between the States of Ohio and Michigan to the city of Ann Arbor. Some work had been done in preliminary surveys and in acquiring rights of way between these two cities.

"On the 16th day of April, 1904, a contract was entered into between the Toledo & Northwestern Railway Company and Patrick Hirsch wherein it was provided that the two railway companies above mentioned should be consolidated in a corporation to be known as the Toledo, Ann Arbor & Detroit Railway Company, which consolidated company should have

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a capital stock of $1,500,000, and should issue bonds to the amount of $1,500,000, secured by a first mortgage on its property; that this contract should be assumed by the consolidated company, and Patrick Hirsch agreed in said contract to construct and complete a railroad from the city of Toledo in the State of Ohio to the city of Ann Arbor in the State of Michigan for said consolidated company, to equip the railroad with all necessary power houses, electrical machinery, substations, passenger and freight depots, and to do everything to make a complete railroad, for the sum of $2,765,000, to be paid with the stock of the consolidated company to the extent of $1,490,000 par value and $1,500,000 of its first mortgage bonds at 85 per cent., the same being the entire stock and bond issue of the consolidated company except 10 shares of the capital stock.

"This contract provided that, immediately upon the execution of the mortgage by the consolidated company, the trustee therein should deliver to Patrick Hirsch $240,000 face value of the bonds and contemporaneously $690,000 par value of the capital stock of the company, which were to be received by the contractor as part payment of the contract price, and the balance of the bonds and stocks, it was provided, should immediately be delivered to John H. Clauss, as trustee. It was further provided that, upon the commencement of the work by the contractor, Clauss, as trustee, should deliver to him $210,000 of the bonds and $133,000 par value of the said stock, and that each 30 days thereafter the trustee should, upon the receipt of a certificate of an engineer of the consolidated company, deliver $85,000 face value of the bonds and $50,000 par value of the stock, and upon the completion of the work should deliver the balance of the stocks and bonds to the contractor. And it was further provided that said Clauss was fully empowered, in his discretion, to hypothecate all of the bonds and stock held by him in escrow, as he might deem it wise, as collateral security for the notes of the contractor or for the payment of loans evidenced by such notes. It provided that the contractor should pay for all incidental expenses, legal counsel, engineering, and every other expense connected with the building and completing and equipping of said

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railroad. This contract was, on the 26th day of May, 1904, assigned by Patrick Hirsch to Patrick Hirsch Company, a corporation, in consideration of the issuing to him of all of its common stock.

"The consolidated company, known as the Toledo, Ann Arbor & Detroit Railroad Company, was organized as provided in the contract, and Patrick Hirsch Company, a corporation under the laws of the State of Delaware, was also organized.

"The persons who were promoting this railroad, and who became stockholders of the consolidated company, were also stockholders and officers of the Patrick Hirsch Company. Mr. Clauss, who by this contract is made trustee of the bonds and stocks of the consolidated company, became president of the Toledo, Ann Arbor & Detroit Railroad Company and treasurer of the Patrick Hirsch Company. Many of the directors of the railroad company were directors of the Patrick Hirsch Company; in fact, there were no shares of stock in the railroad company except 10 that were originally subscribed for except the subscription was made through the intermediary, Patrick Hirsch Company.

"In this original contract for the construction of the road, mention is frequently made of Lawrence Barnum & Co. The trustee in the mortgage is to be satisfactory to Lawrence Barnum & Co.; the form and terms of the stock and bonds is also to be satisfactory to Lawrence Barnum & Co.; the first of $240,000 of the bonds and $690,000 of the stock are to be delivered upon the order of the consolidated company in such form as shall be approved by counsel for Lawrence Barnum & Co. Pursuant to this contract, the Toledo, Ann Arbor & Detroit Railroad Company on July 1, 1904, made and executed 1,500 bonds of the denomination of $1,000 each, and a mortgage upon all its property and all the property to be acquired thereafter by it to secure the payment of said bonds, said mortgage running to the Trust Company of America, as trustee, and all of these bonds and all but 10 shares of the stock of the railroad company were placed in the hands of J. H. Clauss.

"As a further preliminary, Patrick Hirsch Com-

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pany entered into two contracts with Lawrence Barnum & Co. These contracts were simultaneously made and are dated June 1, 1904. One of these contracts, marked Exhibit No. 2, is an agreement on the part of Lawrence Barnum & Co. to purchase 1,113 of the bonds of the Toledo, Ann Arbor & Detroit Railroad Company at 85 cents on a dollar at any time within 90 days after the completion of the railroad in accordance with the plans and specifications, and also providing that the road shall be fully completed within two years from the date of the contract. The other of these contracts, marked Exhibit No. 3, in addition to the discount of 15 per cent. on the face of the bonds provides for the payment of $13,912.50 in cash to Lawrence Barnum & Co. each 90 days from the date of the contract to the completion of the road, and also payment of $40,000 in cash and $147,000 of the bonds and $100,000 of the stock of the railroad company; in other words, Lawrence Barnum & Co. was to receive, in addition to $100,000 of the stock, compensation and discount upon the bonds amounting to $443,200 on the basis that the construction would continue two years. The first of these contracts was shown to the various persons desiring to make subcontracts, but the second was not disclosed. The amount of money actually paid to Lawrence Barnum & Co. on account of this underwriting agreement was $90,426.62. As a further preliminary step, a so-called unit agreement, Exhibit 10, was made, wherein the organization of these railroad companies was recited, and the proposed consolidation and the issuance of the bonds and making of the mortgage was also recited, and it was further recited that John H. Clauss is in a position to acquire $240,000 of the first mortgage bonds to be issued by the said consolidated company when and as soon as the same are issued for the sum of $204,000 in cash. It was agreed between the subscribers to said agreement that the said bonds and stocks should be divided into 20 blocks or units, each to consist of $12,000 of said bonds and $34,500 of said capital stock, and that the subscription price of each of said blocks or units of bonds and stocks should be the sum of $10,200 in cash to be paid to said Clauss when called for under the terms of the agreement. The subscribers to this

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agreement subscribed for most all of said units, and it appears from the testimony in this case that these subscribers, each of them, paid $10,200 for each unit, and received the bonds and stocks as above provided. These bonds and stocks were to be turned over to Patrick Hirsch immediately upon the execution of said mortgage by the terms of his contract with the railroad company. The money received upon this unit agreement went into the hands of Patrick Hirsch Company.

"Patrick Hirsch Company then sublet the construction of this railroad to various parties and made contracts with other parties for material to be used in the construction, among which contracts was a contract with Gorman Bros., the original complainants in this cause, for the construction of the power house at the village of Petersburg; and another with the Lamb Wire Fence Company for constructing fences along the right of way of the railroad; and another with J. L. Hosler & Co. for ties and materials to be used in said railroad. In all these contracts it was provided that Patrick Hirsch Company should pay 50 per cent. or thereabouts in cash and give its notes, secured by the first mortgage bonds of the consolidated company, for the other 50 per cent.

"The right of way was acquired by Mr. Burgoon, employed by the Hirsch Company, and title taken to the Toledo, Ann Arbor & Detroit Railroad Company. Nearly all of it was acquired between the city of Toledo and the city of Ann Arbor. The grading was largely done between these two points. Ties and rails were laid from Petersburg south a distance of about 18 miles and extending about 2½ miles into the State of Ohio. The various subcontractors and materialmen had accumulated large quantities of material along the line of the road, more especially at the village of Petersburg, for the construction of the railroad. Most of the actual work of construction was done between the 1st of June and the 1st of December, 1905. At this latter date, all work and furnishing of materials ceased because of the failure of Patrick Hirsch Company to make payments according to its contracts with the various parties.

"Later receivers were appointed in this case for the Toledo, Ann Arbor & Detroit Railroad Company

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in the State of Michigan, and the same persons were appointed, by the court in Ohio, receivers of the railroad company in the State of Ohio, and a receiver was appointed, by the court in Ohio, for Patrick Hirsch Company.

"After the suspension of work, a number of suits were brought by the subcontractors and materialmen against Patrick Hirsch Company; several of them in replevin for material on the ground and some of it in the track, others in attachment, until finally the bill by Gorman Bros. was filed and all parties, including the railroad company, claiming any right to or liens upon the railroad property, or the materials that had been used in the making of the track so far as it was constructed, were before the court in this case.

"On August 24, 1906, the original bill of complaint in this cause was filed by Frank Gorman, James Gorman, and Thomas Gorman, comprising the copartnership of Gorman Bros., against Patrick Hirsch Company, the Toledo, Ann Arbor & Detroit Railroad Company, and the Trust Company of America. The purpose of the original bill was for the appointment of a receiver for the railroad company and to enforce a mechanic's lien against certain property in the village of Petersburg upon which the complainants had built and partially completed a power house under their contract with the Patrick Hirsch Company, which latter company had a contract with the Toledo, Ann Arbor & Detroit Railroad Company to construct the railroad from Toledo to Ann Arbor.

"The Trust Company of America filed its answer and a cross-bill in said cause, in which cross-bill the said Trust Company asked to have foreclosed the mortgage given by the Toledo, Ann Arbor & Detroit Railroad Company to it as trustee, covering all of the property of said railroad company to secure the bonds of said railroad company to the amount of $1,500,000. And in said cross-bill there were made defendants, in addition to the persons already made parties, the Lamb Wire Fence Company, the Fidelity Construction Company, and others.

"On March 19, 1907, the answer of the Toledo, Ann Arbor & Detroit Railroad Company and of Willis Baldwin and I. H. Burgoon, who had theretofore

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been appointed receivers of said railroad company, to the original bill of complaint was filed. The default of Patrick Hirsch Company for want of appearance was entered by the complainants. On November 29, 1907, the Fidelity Construction Company filed its answer to the cross-bill of the Trust Company. On December 7, 1907, James L. Hosler & Co. filed its answer to the cross-bill of the Trust Company, in the nature of a cross-bill, asking that it be given a lien upon the railroad materials furnished by it under a contract with Patrick Hirsch Company and used in the construction of the railroad. On December 14, 1907, the Lamb Wire Fence Company filed its answer in the nature of a cross-bill to the cross-bill of the Trust Company, and asked that it be given a lien on certain property which it had attached in a suit against Patrick Hirsch Company prior to the lien of the mortgage of the Trust Company of America. To the answers and cross-bills of the Toledo, Ann Arbor & Detroit Railroad Company and its receivers and of the Lamb Wire Fence Company and of James L. Hosler & Co., the Trust Company of America filed separate answers. The default of Patrick Hirsch Company, for want of appearance and answer to the cross-bill of the Trust Company, was entered by the Trust Company of America.

"On these several issues a hearing was had before Judge Lockwood, and on July 1, 1908, a final decree was entered finding that complainants, Gorman Bros., and the defendants, the Lamb Wire Fence Company and James L. Hosler and Robert C. Bowlus, had no lien against the property in question; that the mortgage given by the railroad company to the Trust Company of America was a good and valid mortgage and a first lien on all the property of the railroad company, and ordered a sale of the railroad and a distribution of the fund realized to the several bondholders as found in the decree, with the following provisions as to the unit holders. The court further finds that 145 of the remaining bonds secured by the said mortgage aforesaid are valid obligations of said railroad company, and were, at the time of the hearing of this cause, held by the parties set forth in the following schedule to the amounts and of the number set forth opposite their respective names, to wit:

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Schedule B.

Name.	Nos. of Bonds.			Total.
J. B. Foraker	1 to 12	inclusive		12
J. M. Griffith	13			1
Mary S. Bacon	14 to 24	"		11
J. W. Pero & Co	25 to 36	"		12
Chas. Thompson	37 to 48	"		12
M. I. Wilcox Est	49 to 68	"		20
W. A. Jones	69 to 80	"		12
W. M. Holliday	81 to 83	"		3
O. S. Wilcox	84 to 89	"		6
H. E. Rouse	90 to 95	"		6
M. I. Wilcox Est	96 to 99	"		4
H. C. Stahl	100 to 111	"		12
J. H. Clauss	377 to 387	"		11
J. H. Clauss	148 to 159	"		12
J. H. Clauss	136			1
M. C. Briggs Est	137 to 146	"		10
Total				145

"With reference to all these bonds enumerated in Schedule B and secured by said parties under the so-called unit agreement, the court finds they are outstanding obligations of the Toledo, Ann Arbor & Detroit Railroad Company to the amount of their face, together with the accumulated interest. The court further finds that it is claimed by several of the parties of this cause that all of the 145 bonds enumerated in Schedule B were issued to the parties by which the same are held as hereinbefore set forth under the agreement by which said parties or some of them became the owners of a large amount of the capital stock of the said railroad company, for which said parties paid no value, and that the parties so receiving the said bonds are liable to said company and its creditors for the unpaid value of said stock. The court does not at this time determine the question as to the liability of the holders of said last-named bonds as for unpaid stock subscription, but it orders that the amount to which the holders of said 145 bonds would be entitled to receive out of the proceeds of sale of said property to be paid to the register of the court to abide the further order of the court herein on application of either of the holders of said bonds or of the receivers of said railroad company.

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"The railroad having been sold, there was paid to the register of this court November 1, 1909, the sum of $5,060.64, being the amount due to the aforesaid unit holders. The court then made an order July 12, 1909, upon the petition of the receivers, directing a notice to be published requiring all creditors of the railroad company to exhibit their claims and become parties to this suit, as provided by statute, on or before February 1, 1910. In accordance with said order, the Lamb Wire Fence Company, Gorman Bros., and J. L. Hosler and no others filed their intervening petitions, setting up claims amounting to $7,838.88 and $18,628.25 and $———, respectively, growing out of their contracts made with the Patrick Hirsch Company as subcontractors in the building of the Toledo, Ann Arbor & Detroit Railroad. The following also filed claims with the register, but not intervening petitions, claiming to be direct creditors of the railroad company: Jno. O. Zabel, $3,311.32; John White, $241.62; C. H. Masters, $500.00.

"The petitions are too lengthy to quote here. They set forth the facts showing the manner of the organization of the railroad company and the Patrick Hirsch Company, the way the road was attempted to be built, and the method pursued in the issuing of the stocks and bonds of the railroad company; alleging among other things the following: The whole purpose and design of the promoters of the railroad company, being the persons above mentioned and their associates, if any, in all the incorporations, contracts, resolutions and acts aforesaid, or done in connection therewith, was and is: *(a)* To enable said railroad company to issue to said promoters above named the bonds and stocks of the said railroad company at less than their par value, and that the aggregate of said bonds and stocks should be more than twice the actual value of the railroad for which they were ostensibly issued. *(b)* That by the fiction of a contract for the construction of said railroad with another company it might be made to appear that said bonds and stocks were issued for actual value, and thus enable the promoters to receive said bonds and stocks and place them on the market for sale to innocent purchasers at a discount, who could not buy directly from the railroad company at less than par.

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(c) To enable the construction company to make subcontracts with labor and materialmen for the actual construction of said railroad, such as Gorman Bros., but whose claims and demands for payment would be against the construction company and not against the railroad, which latter would have the railroad protected by the lien of the trust deed securing the bonds, and said bonds being payable to bearer, either held by said individuals interested or some one of them, or sold on the market and the proceeds thus received and held for their individual benefits.

"The prayer is as follows: *(a)* That upon the hearing of this petition the said court may make an order declaring the contract made by your petitioners with the said Patrick Hirsch Company for the construction of the said power house as aforesaid to be a contract made with both corporations, and with the officers and directors of said corporations. *(b)* That upon the hearing of said petition, the said court may make an order that said contract was made with the Toledo, Ann Arbor & Detroit Railroad Company, as well as with the Patrick Hirsch Company. *(c)* That the court may, upon the hearing thereof, declare that in equity the said fund should be subject and applied upon the claim of your petitioners.

"On April 5, 1910, the receivers of the railroad company filed a petition to determine the distribution of the money, amounting to $5,060.64, in the hands of the register, alleging among other things: Your petitioners further represent that they are informed and believe that the holders of said 145 bonds, excepting the said Mary S. Bacon, are indebted to the said railroad company largely in excess of said sum now in the hands of said register (and each of them are so indebted), and certain creditors of the said defendant the Toledo, Ann Arbor & Detroit Railroad Company claimed that all of the holders of said 145 bonds, on account of fraudulent acts of said holders in their connection with the organization and management of the said railroad company and the Patrick Hirsch Construction Company, and because of their purchase of the stock of said railroad company, which they severally have not paid for, and which they are severally owing the said railroad company therefor, are liable to the said railroad company and its cred-

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itors as and for unpaid stock subscriptions; and your petitioners aver, upon information and belief, upon the grounds above stated, that all of the said above-named bondholders, except the said Mary S. Bacon, are owing to the said railroad company for unpaid stock as aforesaid for the par value of $33,500 of stock for each 12 bonds held by each of the above-named parties, and that each one of said above-named persons, excepting the said Mary S. Bacon, is owing to the said railroad company the sum of $2,791.66 for each bond so held by him respectively.

"The prayer of the petition was as follows: (1) That the court declare all of said funds in the hands of the register of this court, excepting that proportionable to said Mary S. Bacon, be declared a payment on the indebtedness of the aforesaid parties to the said railroad company, and that the same be paid to the receivers of said company. (2) That, in so far as the holder of said bonds appear in this court, this court determine the amount due to the said railroad company from the said holders of bonds respectively, and order such amounts so found to be due to be paid to the receivers of said railroad company.

"Notice to the unit holders, most of them being nonresident, was given by publication, and, none of them appearing, a default was taken against all of them except Mary S. Bacon, who filed an answer admitting that she was the owner of 11 bonds, but denying that she was a unit holder. To the intervening petitions of the fence company and Gorman Bros., an answer in the way of a general denial was filed by the railroad company and its receivers. The case having been heard before Judge Golden on December 16, 1910, a decree was entered finding in favor of the intervening creditors and Mary S. Bacon, and ordering the receivers to distribute the fund and pay the same out as follows: (1) To Mary S. Bacon her pro rata share on 11 bonds. (2) That he pay the costs and expenses of the receivers and their attorneys as follows: John O. Zabel, $500; Willis Baldwin, $500; I. H. Burgoon, receiver, $60; Edward J. Ready, register, $———. (3) What shall remain in the hands of the court shall be distributed as follows: Pro rata between the said Gorman Bros., Lamb Wire Fence Company, Willis Baldwin, John O. Zabel, J. S.

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Clark, Fred Froehlich, I. H. Burgoon, John White, and Chas. Masters.

"From this decree the railroad company has appealed, and the Lamb Wire Fence Company and Gorman Bros. made a cross-appeal from so much of the decree as provided for distribution to others than themselves."

The first important question to be determined is whether the railroad company has a right to appeal this case. We quote from the brief of counsel for the railroad company:

"Whether or not the railroad company had any right to the so-called fund is neither here nor there; the point is that the appellees, as a foundation for reaching the fund, had to have a decree establishing their claims (which on their face were against another person) as claims against the railroad company. This they have obtained, and they have obtained it by a decree; and, if the railroad company has enough life to obtain a decree against it, then it has enough life to defend itself by an appeal. A corporation is not dead simply because a receiver has been appointed over its property. *State* v. *Merchant*, 37 Ohio St. 251."

This sounds well, but it is not conclusive. At this point it becomes important to know the status of the case when the decree was entered. The answers to the intervening petitions after the formal part commenced as follows:

"The answer of the defendant the Toledo, Ann Arbor & Detroit Railroad Company, and Willis Baldwin and Isadore H. Burgoon, receivers of said defendant, heretofore appointed in said cause by this court, to the intervening petition of James H. Hosler and Robert A. Bollus, filed herein. These defendants and respondents hereby reserving to themselves all right of exception to the said intervening petition for answer thereto say: * * *"

It ended as follows:

"And deny that petitioners are entitled to the re-

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lief prayed for or any part thereof, and ask to be dismissed with their reasonable costs in this behalf expended.

"The Toledo, Ann Arbor & Detroit Railroad Company,
"By JOHN O. ZABEL, Secretary.
"Willis Baldwin and Isadore Burgoon, Receivers and Respondents,
"By JOHN O. ZABEL, Their Attorney.
[Seal.]
"JOHN O. ZABEL,
"Solicitor for Defendants and Respondents."

It will be observed that these signatures are all made by Mr. Zabel. It has already appeared that as early as July, 1908, it was decreed that the amount of the—

'Proceeds of the sale of the property, should be paid to the register of the court to abide the further order of the court on application of either of the holders of said bonds or of the receivers of said railroad company."

It has also appeared that in April, 1910, the receivers petitioned for a distribution of the fund. In that petition a reference was made to the creditors and the amount of their claims, and the following appears: "Your petitioners further show that there are no funds to pay the claims of the said company excepting the sum of $5,060.64 and such sum as may be realized from such unpaid stock subscriptions"—showing clearly that the railroad company was insolvent. It also appears that after a hearing, and in December, 1910, a decree was entered which, after the formal part, reads in part as follows:

"This cause came on to be heard upon a petition of Willis Baldwin and Isadore H. Burgoon, receivers of the Toledo, Ann Arbor & Detroit Railroad Company, heretofore appointed herein by this court, the answer of Mary S. Bacon thereto, and upon the intervening petitions of Frank Gorman and Thomas Gorman, survivors of the copartnership theretofore doing

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business under the firm name and style of Gorman Bros., the intervening petition of the Lamb Wire Fence Company, a corporation, and the intervening petition of J. L. Hosler & Co., a copartnership, the answer thereto, the replication of said intervening petitioner to such answers, and the proofs taken in open court in said cause, and having been argued by counsel for the respective parties, and the court having duly considered the same, the court finds as follows."

Then follow the findings of the court, including costs and expenses to the receivers and their attorney. Indorsed on this decree is the following:

"I consent to the entry of the above decree.
"JOHN O. ZABEL,
"Attorney for Receivers."

It will be remembered that Mr. Zabel had appeared for all the defendants, and that they had no other solicitor of record. It is clear he had knowledge of the proposed decree, and that the railroad company, as a company, had no interest in the fund, and that it was hopelessly bankrupt. It does not appear that any objection was made to the entry of this decree by Mr. Zabel or by anybody else. Later Mr. Zabel ceased to be the solicitor for the railroad company, and another was substituted in his place by his consent, and this appeal was taken. The fact should not be overlooked that, though notice was given of the petition by publication, none of the unit holders appeared. It should also be remembered that, when this decree was made, the railroad company was in the hands of a receiver, and, so far as the record discloses, is still in the hands of a receiver. The court was not requested to direct the receiver to appeal from the decree. No request was made of the court, or granted, giving the railroad company permission to appeal the case.

The following proposition of law has been stated as to chancery appeals:

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"An appeal can only be taken by parties who are affected by the decree appealed from; there must be some substantial rights of the parties to which the appeal would be prejudicial. An appeal will not be allowed in a mere fictitious case, and the court will not entertain mere speculations of parties or feigned issues; and so a merely fictitious case to test the rights of parties who do any particular thing will not be entertained by the appellate courts." Van Zile's Equity Pleading & Practice, § 360, p. 494.

See *Chapin* v. *Perrin*, 46 Mich. 130 (8 N. W. 721); *Owen* v. *Yale*, 75 Mich. 256 (42 N. W. 817); *Weber* v. *Costigan*, 139 Mich. 146 (102 N. W. 666).

In this case, under all the facts surrounding it, with the railroad company having no interest in the fund, to say that as to the receivers the decree was a consent decree from which they could not appeal, but as to the railroad company it was not a consent decree from which it could appeal, would be a refinement of words which does not appeal to our sense of justice. We think it must be held that as to the railroad company the appeal should be dismissed. This brings us to the cross-appeal. Objection is made to the allowance to Mary S. Bacon. We think the answer of Mrs. Bacon, the testimony of her husband, and the consent of the receiver justified this part of the decree.

Objection is made to the allowance for solicitor's and receiver's fees. The trial judge was familiar with the litigation which was very considerable, and there is nothing to indicate that he abused his discretion in making these allowances.

Objection is made to the allowance of certain claims, which it is said were not filed with the register. The record shows the attention of the court was called to these claims and proofs were taken in open court in relation thereto. We think the decree as to them should not be disturbed.

We again quote from the brief:

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"If, however, the court should be of the opinion that they should participate, then we think the court should allow the solicitors of Gorman Bros. and the Lamb Wire Fence Company reasonable compensation for their services in prosecuting this case, to be charged against the fund. Otherwise Gorman Bros. and the Lamb Wire Fence Company, who were diligent and complied with the order of the court, must pay their solicitors in both the lower court and Supreme Court, and to that extent, be worse off than the other creditors, who were tardy and failed to comply with the court's order."

Our attention has not been called to any place in the record where the solicitors made this claim in the court below. No reference is made to this subject in the cross-appeal.

We find no reversible error, and the decree is affirmed. As both parties have appealed, no costs will be allowed.

STEERE, BROOKE, KUHN, and STONE, JJ., concurred with MOORE, C. J.

OSTRANDER, J. I think that no reason is given in this opinion for denying to the defendant railroad company the right to appeal. As a majority of the justices are of a different opinion, it is not necessary for me to examine other questions.

MCALVAY, J., concurred with OSTRANDER, J.

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PITTSBURGH PLATE GLASS CO. *v.* CHARLES KLEIN CO.

APPEAL AND ERROR—QUESTIONS REVIEWABLE—MOOT POINTS.

Where complainant filed a bill to enforce a lien for materials furnished in the remodeling and reconstruction of a building, and defendants contended that under the contract with the principal contractor the entire cost was to be offset against an indebtedness outstanding between the contractor and the defendant in possession, and the final decree determined that no contract, as claimed, was made, as shown by the uncontradicted proofs, and where one of the defendants, a corporation, had taken an assignment of all claims for liens allowed by the decree in the name of its president, such corporation and the defendants who claimed interests in the building could not try the suit on appeal under a stipulation by which it was stated that the contract contained an agreement to offset the said indebtedness to the contractors against the cost: the effect of such stipulation between a portion of the parties, could bind only the parties executing it, and the question presented was in the nature of a moot point, which the appellate court will not review.

Appeal from Wayne; Donovan, J. Submitted April 5, 1912. (Docket No. 55.) Decided March 20, 1913. Rehearing denied May 1, 1914.

Bill by the Pittsburgh Plate Glass Company against the Charles Klein Company, Gertrude M. Baldwin, the Detroit Lumber Company, and others, for the enforcement of a mechanic's lien. From a decree for complainant and other lienors, said Baldwin and the Detroit Lumber Company appeal. Affirmed.

D. B. Hayes and *Bumps & Bishop,* for appellants.

E. T. Berger, for appellee the Detroit Lumber Company.

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MCALVAY, J. This was a proceeding in chancery on the part of complainant to enforce its lien, under the mechanic's lien law, for material furnished in the construction and remodeling of a certain building in Detroit, occupied by defendant Charles Klein Company as lessee and owned by defendant Gertrude M. Baldwin.

The printed record is a brief one of but 20 pages. The original return to this court, which contains all the proceedings and pleadings had therein, except the testimony taken in the case, contains 200 or more typewritten pages. This printed record does not show the original bill of complaint or any of the pleadings in the case, except the cross-bill of the Detroit Lumber Company and the answer of defendant Charles Klein Company thereto, signed and verified by Walter Klein, its vice president. It contains, also, the decree granted under the issue between said parties on November 14, 1911, upon pleadings and proofs heard in open court on that date, which decree determines that there was due to the defendant the Detroit Lumber Company $582.22 for materials furnished in the construction of the building in question. It also determines certain amounts due to four other lienors, including complainant, and recites that the four claims and liens of such lienors had been duly assigned to Walter Klein, and the aggregate amount of such claims to be $757.68; and it further decrees that the principal contractors, McIntyre & McIntyre, are indebted to the Detroit Lumber Company, and also to Walter Klein, as assignee, in the amounts above stated, which they are decreed to pay within a certain time, and in default thereof that these parties are decreed to have a statutory lien against the premises described, of which Gertrude M. Baldwin is the owner and Charles Klein Company lessee, and providing for the collection of such amounts, together

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with costs and interest, by sale in the usual manner provided in such cases.

The record shows that McIntyre & McIntyre, a firm of contractors and builders, undertook to construct and remodel the building upon the premises in question, of which the defendant Charles Klein Company was the lessee. In the answer of said defendant to the cross-bill of the Detroit Lumber Company, the claim is made that McIntyre & McIntyre, before they undertook the contract to construct and remodel this building, were indebted to the defendant the Charles Klein Company to the amount of $2,708.70, and that they entered into a verbal contract with such defendant to erect and remodel the building, according to the plans and specifications agreed upon, for the sum of $2,617, with the express understanding and agreement between the parties that the aforesaid indebtedness of $2,708.70 was to be paid by the performance and completion of the work on this building according to said contract.

The record shows a settlement of the case on appeal, reciting that it was made on November 15, 1911, purporting to recite the hearing of testimony of certain witnesses and including a stipulation of facts, entered into by and between the solicitors for the defendant Charles Klein Company and for the cross-complainant the Detroit Lumber Company, in writing, which the original return shows was dated November 15, 1911, and further purports to show that on November 22, 1911, the court had made a decree in said case in terms the same as already herein recited in the decree of November 14, 1911, and that the court thereupon, upon the request of these solicitors, last above named, certified that the transcript contained the substance of all the evidence in the case and the stipulation of facts, and settled and signed such transcript December 21, 1911.

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The following is the stipulation of facts referred to:

"State of Michigan. In the Circuit Court for the County of Wayne, in Chancery. Pittsburgh Plate Glass Co., Complainant, v. Charles Klein Co. et al., Defendants. No. 35,858.

"Stipulation of Facts.

"In the year 1909 the Charles Klein Company, a corporation, one of the defendants, was a tenant by a term lease of premises on Broadway avenue, in the city of Detroit, owned by Mrs. Gertrude M. Baldwin. The Charles Klein Company entered into a verbal contract with Messrs. McIntyre & McIntyre, copartners engaged in the building and contracting business, to remodel and improve said premises for the sum of $2,617, in accordance with certain plans and specifications. It appears that at the time the said verbal contract was made, in July, 1909, Messrs. McIntyre & McIntyre were indebted to said Charles Klein Company on an old obligation represented by notes, some of which were due, and some not due, amounting to approximately $2,700. It is claimed by said Charles Klein Company that it was a part of the aforesaid verbal contract and agreement so made and entered into with said Messrs. McIntyre & McIntyre that the amount of the contract for remodeling the premises should be offset and paid by the amount of the old indebtedness owing to the said Charles Klein Company. This agreement, it is admitted, was wholly verbal, and was entered into before the defendant the Detroit Lumber Company had contracted with Messrs. McIntyre & McIntyre to furnish the lumber for such remodeling, and was unknown to the Detroit Lumber Company until after all the lumber and material had been furnished and used in the premises to the amount of $582.22. John McIntyre, testifying in this case, denies that any agreement to offset these claims was made; but for the purpose of this case, and for the purpose of this appeal:

"It is stipulated and agreed between the parties that such an agreement as is claimed by said Charles Klein Company, as herein set forth, was made at the time specified, and such agreement was verbal, and entirely without the knowledge of the Detroit Lum-

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ber Company; and, further, that said Charles Klein Company actually set off the aforesaid indebtedness and credited Messrs. McIntyre & McIntyre with the full amount due the latter on their contract before the Detroit Lumber Company filed their claim of lien in this case. Upon these facts is the defendant and cross-complainant, the Detroit Lumber Company, entitled to a lien and a decree for its enforcement?

"It is stipulated and agreed that, if the defendant the Detroit Lumber Company is entitled to a lien, the decree shall be for the sum of $582.22; if not entitled to a lien, the Detroit Lumber Company shall not recover any amount, and the cross-bill may be dismissed.

"It is further stipulated and agreed: That the following amounts are due to the following respective parties to this suit from Messrs. McIntyre & McIntyre for work and labor performed and materials furnished said Messrs. McIntyre & McIntyre on said contract:

Christian De Croupet	$294 74
Frederick B. Stevens	113 10
Henry Houghton	114 31
Pittsburgh Plate Glass Co.	235 53

"That Walter Klein is the assignee of said respective claims; and if, under the foregoing facts, the Detroit Lumber Company is entitled to a lien on said premises, it is stipulated and agreed that said Walter Klein, as assignee, is also entitled to a lien on said premises for the sum of $757.68.

"BUMPS & BISHOP,
"Solicitors for Defendant Charles Klein Co.
"E. T. BERGER,
"Solicitor for Cross-Complainant
Detroit Lumber Co.
"Dated, Detroit, Michigan, November 15, 1911."

This case, as settled by the circuit judge, was accepted as the case on appeal by their respective solicitors for the benefit of defendants Charles Klein Company, Gertrude M. Baldwin, and the Detroit Lumber Company by a stipulation in writing.

The original return shows that defendants Charles

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Klein Company and Gertrude M. Baldwin appealed from the decree which, in their claims of appeal, filed December 26, 1911, and February 10, 1912, respectively, is said to have been rendered November 22, 1911; and the part of the record brought to this court on such appeal is the issue made upon the cross-bill of defendant the Detroit Lumber Company and the answer of defendant Charles Klein Company, settled and certified as herein stated. The confusion of dates in this record as to the decree may partly arise from the fact that it was not filed for several days after it was granted.

It is evident from the record and from the recitals in the stipulation of facts that this stipulation was made and entered into after the hearing of said cause and the rendering of the decree therein. In the stipulation of facts appears the claim of the defendant Charles Klein Company relative to the claimed verbal contract entered into between it and the principal contractors, McIntyre & McIntyre, who are defendants in this suit, and against whom the decree is taken and their liability fixed as to the entire amounts found to be due the lienors in such suit. The stipulation also shows as follows:

"John McIntyre, testifying in this case, denies that any agreement to offset these claims was made; but for the purpose of this case, and for the purpose of this appeal, it is stipulated and agreed between the parties that such an agreement as is claimed by said Charles Klein Company, as herein set forth, was made at the time specified and such agreement was verbal."

It is therefore admitted that there was evidence in the case, by the testimony of one of the parties to the claimed contract, denying the existence of any such agreement, and there is no evidence to the contrary. The entire case of appellants in this suit is founded upon the stipulation of facts. The sole question re-

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lied upon and discussed by appellants is whether the claimed agreement would defeat the liens of defendant Detroit Lumber Company and the other lienors.

The making of a stipulation of facts in a case by a part only of the parties thereto, where a decree, already made, fixes the rights of all the parties, and which stipulation, on its face, is contrary to substantive evidence in the case, presents at least a novel proposition. It is well settled that parties, by a stipulation, cannot affect any rights but their own. The testimony of John McIntyre is not disputed, and the decree of the court, fixing the rights of the parties and determining the liens of the materialmen, concerning the amount of whose claims there is no dispute, was warranted by the evidence in the case.

While we appreciate that the question sought to be brought up by this stipulation is an interesting one, we will not discuss it, for the reason that, in our opinion, the defendant Charles Klein Company did not, upon the hearing of the case, establish the contract claimed to have been entered into with the contractors. And we suggest that it is apparent from the record that all the claims of other lienors, except defendant Detroit Lumber Company, had been assigned before decree to Walter Klein, vice president of the Charles Klein Company; and that the decision of this court is sought upon what, in effect, is a moot question.

The decree of the circuit court is affirmed, with costs.

STEERE, C. J., and MOORE, BROOKE, STONE, and OSTRANDER, JJ., concurred

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OCTOBER TERM, 1913.

CARVER *v.* BIELEKE.

1. AMENDMENTS — PLEA — RECOUPMENT — APPEAL FROM JUSTICE'S COURT — TRIAL — LEASE.

   Upon the trial of an appeal from a justice's judgment in favor of plaintiff, who brought an action for rent due under a written lease, wherein defendant, the tenant, had orally given notice of set-off and recoupment in general terms, and had defended on the ground that the landlord had failed to repair certain leased buildings as it was stipulated in the lease, and had filed a written bill of particulars of his claim before the justice who in part allowed it, the circuit court should have permitted the defendant to introduce evidence in support of the alleged recoupment, and erroneously rejected the testimony on the ground of insufficiency of the notice of defense.

2. SAME — CONSTRUCTION — APPEAL AND ERROR.

   Technicalities and formalities are not countenanced in the review of pleadings in justices' courts: the purpose of pleadings is to inform the parties what they will be called upon to meet, and if sufficient notice is given, objections should not be sustained.

Error to Wayne; Murphy, J. Submitted April 18, 1913. (Docket No. 95.) Decided October 10, 1913.

Assumpsit in justice's court by Walter Carver against Gustow Bieleke for rent. From a judgment for plaintiff defendant appealed to circuit court. Judgment for plaintiff. Defendant brings error. Reversed.

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W. C. Gottman, for appellant.

Edward M. Vining, for appellee.

MCALVAY, J. Plaintiff brought suit against defendant before a justice of the peace for Wayne county, declaring orally in an action of assumpsit and on all the common counts, and especially on a certain written lease for a certain rent claimed to be due. The defendant pleaded the general issue and "gave notice of set-off and recoupment." It is claimed by defendant that on the trial before justice's court a bill of particulars of his recoupment was filed with the court, and testimony in recoupment was offered and introduced in evidence and considered by the court. Plaintiff claims that this bill of particulars was not filed with the justice, but does not deny that the question of recoupment was litigated. Plaintiff's only claim was for two installments of rent under this lease, amounting to $250. The trial before the justice was without a jury, and resulted in a judgment against defendant for the sum of $199 and costs. Defendant appealed from this judgment to the circuit court for Wayne county, where the case came on to be heard before a jury. During the trial, while defendant was putting in his proofs, objection was made for the first time that no proper notice of recoupment had been given, and therefore that testimony upon such recoupment was not admissible under the pleadings. It appeared in the proofs in the case that there was a provision in the lease that plaintiff, as lessor, agreed to fix the roof of the barn upon the premises leased. The words of the lease necessary to be quoted are:

"The first (party) agrees to shingle house and fix roof on barn."

The roof of this barn covers a part used as a horse barn, and also that part used as a cow barn. Plain-

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tiff reshingled that part of the barn called the "horse barn," but refused to repair the balance of the roof. The objection of plaintiff to the introduction of any evidence as to recoupment for damages by reason of the leaking of the balance of the roof was sustained, after considerable colloquy between the court and counsel, which excluded all evidence of damage arising therefrom. Counsel for defendant then moved for leave to amend his plea and file the particulars of his recoupment, which was used in justice's court, *nunc pro tunc*, or for a continuance of the case to get a further return from the justice, claiming that he had not seen the return until the day before the trial began. The court denied the motion and then, on motion of plaintiff, directed a verdict in his behalf for the sum of $250, the full amount claimed, basing his decision upon the ground that defendant's attorney had not used due diligence, and that a continuance would entail a delay, which did not make for the speedy administration of justice. Upon this verdict a judgment against defendant was duly entered. Later defendant made a motion for a new trial, which was denied. From the judgment entered upon such directed verdict defendant, upon writ of error, reviews the case in this court.

The principal contention in the case is upon the exclusion by the court of all evidence showing recoupment, on the ground that no proper notice of recoupment had been given. Upon this proposition the record shows, from the return of the justice, that the pleadings in that court, both on the part of plaintiff and defendant, were oral. It appears from the record of the trial in the circuit court that in justice's court defendant put in his defense of recoupment, and the amount of the judgment indicates that such recoupment was allowed in part. During the discussion before the court counsel for plaintiff in effect admitted that a bill of particulars of defendant's

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claim of recoupment was received and used in justice's court, and defendant was allowed to testify concerning his damages by reason of plaintiff's default in his lease, and that he was cross-examined upon such claim. As already stated, the judgment in justice's court was $51 less than the amount claimed by plaintiff.

This court has repeatedly held that justice court pleadings should be viewed with liberality, technicalities discountenanced, and substance instead of form required. This claim of recoupment, the bill of particulars of which was presented to the justice and used without objection upon the trial by defendant, and upon the testimony which defendant gave under it he was cross-examined by plaintiff, was sufficient, added to the pleadings in the case, to warrant the justice in receiving testimony under it, and also to give notice to the plaintiff of the nature of the claim of defendant with sufficient certainty to prevent surprise as to what he would be called upon to meet with his proofs. Whether the justice marked the paper as filed in the case does not appear. Plaintiff's attorney says he is informed it was not filed. The entire purpose and sole requirement of pleadings in justice's court is to inform the opposite party what he will be called upon to meet. This knowledge plaintiff had in the justice's court, and accepted without protest or question, as far as the record shows. He made no claim that he was surprised. Counsel for plaintiff, and apparently the court, relied upon the case of *Watkins* v. *Ford*, 69 Mich. 357 (37 N. W. 300). We think that the cases are distinguishable. In the instant case, by the itemized bill of particulars upon which the defense was based in justice's court, as already stated, plaintiff was informed of defendant's claim, while in the case relied upon and the other cases cited, nothing appears to have been brought to plaintiff's notice but the general state-

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ment that defendant "gave notice of set-off and recoupment." In view of the liberality with which this court has always viewed pleadings and proceedings in justice's court, where formalities and technicalities have been discountenanced, and that the pleadings are held good if sufficient notice has been given as to what issue is to be met, we are of the opinion that the court should have overruled the objection of plaintiff, and should have received evidence offered by defendant in recoupment. From the record of the trial in the circuit court it is apparent that this claim of recoupment was made in good faith, and that the construction of the lease relative to the repairs upon the roof of the barn is involved.

In the motion for a new trial made by defendant this matter of his contention that he was entitled to introduce evidence in recoupment on his defense was emphasized and called to the attention of the court as one of the reasons why a new trial should be granted. From what has been already said upon the subject, our conclusion is that the court was in error in refusing to allow defendant to show recoupment, and also in refusing later to grant a new trial.

The judgment of the circuit court is reversed, and a new trial is granted.

STEERE, C. J., and MOORE, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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EATON *v.* HOPE.

1. SALES—WARRANTIES—EVIDENCE—REMOTENESS.
   Testimony of witnesses, who had owned a mare before defendant, that it had no bad habits or traits when they owned it several years before it was sold to plaintiffs, was not too remote, in an action for breach of warranty, where defendant claimed that the horse acquired the alleged vices or habits after plaintiffs purchased it.

2. TRIAL—ARGUMENT—ISSUES—MISCONDUCT OF COUNSEL.
   Upon disputed testimony concerning the qualities of a mare which plaintiffs claimed had the habit of kicking, the respective vocations of plaintiff and defendant who had testified were a proper subject of comment in the argument.

3. SALES—JOINT PURCHASE—HUSBAND AND WIFE.
   There being a dispute whether the plaintiffs' who were husband and wife, had jointly purchased the mare, the court was correct in submitting the question to the jury.

4. SAME.
   Instructions to the jury that plaintiffs had the burden of proof to establish every allegation by a preponderance of the evidence, was error: the plaintiffs could recover if they proved any one of the several breaches alleged and relied upon.

Error to Kalamazoo; Knappen, J. Submitted June 3, 1913. (Docket No. 11.) Decided October 10, 1913.

Assumpsit by Fred R. Eaton and Bernice E. Eaton against Chauncey Hope for breach of warranty in the sale of a mare to plaintiffs. Judgment for defendant. Plaintiffs bring error. Reversed.

Fred A. Mills and *Harry C. Howard,* for appellants.

Claude S. Carney, for appellee.

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KUHN, J. The plaintiffs brought suit to recover damages from the defendant for an alleged breach of warranty arising from the sale of a horse. The breaches of warranty relied upon are stated in plaintiffs' declaration as follows:

"That said horse, to wit, a mare, being the said horse taken by the plaintiffs from said defendant, was not as said defendant represented, and was not free from vice, and was not all right in every spot and place, and would not work double as said defendant represented, and said horse was not kind and gentle but was what is known as a 'switcher and kicker,' and said horse had a very bad disposition."

The trial resulted in a verdict of no cause of action, and plaintiffs bring the case to this court by writ of error. The errors complained of are grouped by plaintiffs' counsel in their brief as follows:

"*First.* Errors in the ruling of the court, made before submitting the case to the jury.
"*Second.* Improper argument of defendant's counsel.
"*Third.* Errors in the charge:"

As to the first, objection is directed principally to the testimony of Mr. and Mrs. Wightman, who had owned the mare from the time she was three years old until she was six, when they sold her to the defendant, Hope. They were allowed to testify as to what her habits were during the time they had her, and the objection is now urged that this was too remote to be of any assistance to the jury in determining what her habits were at the time of the sale, several years later. In view of the claims made by plaintiffs that the horse had been warranted to be free from vice and had no bad habits, and the claim made by the defendant that if the mare had any vicious habits they were such as she acquired after the sale to the plaintiffs, because of having foaled her colt, it was proper to allow considerable latitude in showing the

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habits of the mare to determine whether or not she had acquired the vicious habits before or after the sale to the plaintiffs. For the same reason there was no error in admitting the testimony of the other wit nesses examined as to the habits of the mare.

During the argument to the jury of one of the attorneys for the defendant, the following occurred:

"You men, or most of you, are farmers, and most of the counsel have had some experience on farms, and I want you to consider this case on the one hand between a young banker and on the other hand against an old farmer.

"*Mr. Howard:* I object and except to this line of argument. It is not a proper line of argument to hold up to the jury the fact that one of the plaintiffs is a banker and that the defendant is or has been a farmer. These matters should have no bearing upon the case.

"*The Court:* I think it is proper to allude to the respective vocations of the parties.

"*Mr. Howard:* This is going beyond that, and I take an exception."

The vocation of the parties to the controversy was brought out by the evidence, and, as their experience with horses would necessarily be helpful to the jury in determining what weight to give their testimony in determining the various questions of fact submitted to them, we do not find it prejudicial for counsel to have called their attention to the vocations of the parties shown by the evidence and without using any abusive or extravagant language in commenting thereon.

At the close of plaintiffs' proofs, counsel for the defendant requested the court to direct a verdict because there was a misjoinder of plaintiffs; it being contended that the proofs showed that the contract of purchase was made with Fred Eaton alone and that the note given in payment of the horse was signed by his wife, Bernice Eaton, merely as a surety. The court thereupon gave counsel the opportunity to

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amend the declaration by striking out the name of the coplaintiff, Mrs. Eaton. Counsel decided, however, to stand upon the declaration as originally filed, and the court thereupon submitted to the jury the question as one of fact and charged them in the following language:

"In determining who were the purchasers of the horse, you have a right to consider that both Mr. and Mrs. Eaton signed the note, intending that both should be bound as principals. If Mrs. Eaton had signed merely as surety for her husband, under the laws of the State of Michigan she would not be bound, but in Michigan there is no rule to prevent a married woman from becoming a joint debtor with her husband on a proper consideration. And if you find that it was the intention of the parties and the parties meant that she should become a joint debtor for this mare, a joint purchaser, consequently a joint debtor, then you would be justified in concluding that she was joint owner of the mare."

There was some testimony, though meager, to show that the horse was purchased by plaintiffs jointly; that it was a joint contract; and also evidence to prove that Fred Eaton alone had purchased the horse and his wife did not become connected with the transaction until a signer or surety to the note was demanded. There being a conflict in the evidence on this point, it was properly submitted to the jury.

Attention is called to various parts of the court's charge, and exception is taken to the following, which was given:

"I am also requested to charge you by the defendant: (7) You are instructed that the plaintiffs have the burden of proof upon them, and it is necessary, to entitle them to recover, that they should prove every essential claim by a fair preponderance of the evidence; to entitle them to recover they must prove each and every allegation in this case by a fair preponderance of the proofs; and, if you fail to find any one of the allegations on the part of the plaintiffs

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made out by such preponderance, then you will find in favor of the defendant and render a verdict of no cause of action."

This part of the charge was one of the defendant's requests to charge and was given as such. In giving it the court called particular attention to it. It was an incorrect statement of the law applicable to the case, because it was not necessary for the plaintiffs to prove each and every claim made by them as to the warranties. *Lepard* v. *Railroad Co.*, 166 Mich. 373 (130 N. W. 668, 40 L. R. A. [N. S.] 1105). It was sufficient if the plaintiffs established by a fair preponderance of the evidence that any one of the allegations covered by the warranty was true. It cannot be said, under these circumstances, that the error was cured by the rest of the charge, as it is to be presumed that the jury may have followed the law as given to them in this request to charge. *Grand Rapids, etc., R. Co.* v. *Monroe*, 47 Mich. 152 (10 N. W. 179); *Madill* v. *Currie*, 168 Mich. 546 (134 N. W. 1004).

Because of this error, the case must be reversed, and a new trial granted.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ., concurred.

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PEOPLE *v.* HAMMOND.

1. LARCENY—CRIMINAL LAW—EVIDENCE OF IDENTITY.
   If, from the opportunity of a witness to identify respondent, who was charged with the larceny of an automobile, her opinion was of value, it could properly be received: having seen respondent and had a good opportunity to judge of his appearance, the witness might be permitted to testify that the accused looked like the same person who had the automobile.

2. CRIMINAL LAW—EVIDENCE—ADMISSIONS.
   Testimony of reputable witnesses, in a larceny case, that they suspected the respondent was a thief, and charged him with having committed a theft, was harmful and erroneously received, though they also testified that he denied the accusation.

3. SAME—IMPEACHMENT.
   Testimony relative to such conversation, which respondent stated he did not recollect, was not made competent by his failure to remember, since it is not permissible to impeach a witness by evidence of immaterial facts.

4. WITNESSES—IMPEACHMENT—SECONDARY EVIDENCE.
   A witness for respondent, having testified that he worked for a railroad company about two or three years at different times, could not be impeached by introducing in evidence records of the company not shown to be complete or correctly kept.

5. CRIMINAL LAW—CHARGE—REASONABLE DOUBT.
   Refusal of the court to charge that each member of the jury must be convinced of respondent's guilt beyond a reasonable doubt, *held*, not erroneous under instructions that fairly covered the question of reasonable doubt.

6. SAME.
   But the court erred in refusing to give a request that respondent's testimony was to be tested like the other witnesses, and if rational, natural, and consistent, might outweigh the testimony of all others; the point not being covered by the charge and no instructions being offered as to the weight or credibility of testimony.

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Error to the recorder's court of the city of Detroit; Connolly, J. Submitted June 13, 1913. (Docket No. 123.) Decided October 10, 1913.

Chauncey W. Hammond was convicted of larceny. Reversed.

Grant Fellows, Attorney General, *Hugh Shepherd*, Prosecuting Attorney, and *Paul W. Voorheis*, Assistant Prosecuting Attorney, for the people.

William J. Weakley, for respondent.

KUHN, J. The respondent was convicted in the recorder's court of the city of Detroit of the larceny of an E-M-F automobile of the value of $1,200 and was sentenced to the State prison at Jackson, where he is now confined, for a term of not less than 2½ years, with a recommendation of the maximum of 5 years. The automobile was taken from in front of the Fine Arts Building in the city of Detroit on the evening of the 31st day of May, 1911, and was found on June 12th following in the possession of the respondent and William Fraser, in the city of Columbus, Ohio, at which time they were arrested.

One Joseph Du Gaw testified that on the 1st day of June, 1911, the respondent called him by telephone and asked him for the privilege of putting an automobile, which he said he had, in a shed back of Du Gaw's residence and Du Gaw gave him permission so to do. Du Gaw was not at home for the remainder of the day, but his aunt, Louise Scott, who was at his house, was produced as a witness and testified that on the afternoon of the 1st day of June a young man resembling the respondent, Hammond, asked the way to the shed back of the house. She heard the noise of an automobile being put in the shed and later saw the wheels of the car through a window in the

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shed; that that evening, about 8 o'clock, some one came and took the automobile out of the shed, but she could not say positively that it was the respondent, Hammond.

Error is assigned because of the admission of her testimony, and it is claimed that her statement with reference to the young man who brought the automobile looking like Hammond was a mere opinion. She stated on her direct examination that she supposed it was Hammond, and "this young man [the respondent] looks very much like the young man." There is no question that she saw a young man and had a good opportunity of judging of his identity. As was said in *People* v. *Stanley*, 101 Mich. 93, 96 (59 N. W. 498, 499):

"It is not necessary that witnesses shall swear to a fact with certainty. If, from their opportunity of judging of the identity, their opinion is of value, it is receivable."

We think there was enough to admit this testimony in the instant case, and the jury could give it such weight as they might think it was entitled to.

In the case of *People* v. *Gotshall*, 123 Mich. 474 (82 N. W. 274), relied upon by counsel for respondent, several witnesses testified that the man they saw near the location of the alleged crime resembled the respondent in height and size, but it does not appear that they identified him in any other way, and it further appeared that the accused was a man of average stature. The court said:

"Such testimony is merely the expression of an opinion based upon the most casual observation."

It is clearly distinguishable from the present case.

Respondent testified upon his cross-examination as follows:

"Dietsche spoke to me about this car. I don't remember everything that was said. I remember that

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he mentioned about this car being stolen. What else took place there I don't remember. I don't remember any talk about an automobile tire.

"*Q.* Will you say that there wasn't any talk about a stolen automobile tire?

"*Mr. Wilkins:* I think this is entirely immaterial as to what conversation took place about matters not connected with this automobile; it lumbers up the record, and I object to it as incompetent and irrelevant.

"*Mr. Voorheis:* I understand the talk is intermingled, and I am trying to find out what was said.

"*Mr. Wilkins:* Dietsche said nothing of that kind.

"*The Court:* Take the answer. (Exception for the defendant.)

"*A.* I don't remember any talk about an automobile tire.

"*Q.* Now, didn't Dietsche say at this time that if you would return the automobile that he would not prosecute you or make any complaint for the taking of the automobile tire?

"*Mr. Wilkins:* I object to that. What Dietsche may have said is not binding at all on this defendant. Dietsche may have made lots of remarks, but that should not be allowed to prejudice this man on trial here on this charge.

"*The Court:* Take the answer. (Exception for the defendant.)

"*A.* No, I don't remember that he did. I will not say that he did not say so."

The prosecuting attorney having rested his case, the following is a portion of the record thereafter made by the people:

"Witness Dietsche, recalled for the people:

"When Hammond was at my place of business he came there in response to a request that I sent for him to go. At that time the automobile that I had reference to and that I talked about was the automobile that was out in his barn. This was either Monday or Tuesday, the 5th or 6th of June.

"*Q.* Did you or didn't you at that time say that if Hammond would return the automobile you would not prosecute him or make any complaint for the taking of the automobile tire?

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"*Mr. Wilkins:* That question is objected to. There is absolutely nothing at all; there is no foundation laid for that at all. Your honor ruled out anything except what was said about the automobile.

"*The Court:* No, that may go in.

"*Mr. Wilkins:* I take an exception. There was no foundation laid for it.

"*The Court:* He has got the transcript before him. You may repeat the question and take the answer.

* * *

"*Mr. Wilkins:* There is no foundation, and furthermore it is immaterial, incompetent and irrelevant.

"*The Court:* You may have the answer.

"*A.* Yes, I did say that.

"*Q.* That is all.

"*Mr. Wilkins:* I ask that that testimony be stricken out as incompetent and immaterial. There is no occasion for bringing in something for which there is no foundation laid; and there is no testimony here; and there has been no testimony of anything to show anything about an automobile tire stolen or alleged to have been stolen, or no charge made for anything about a stolen tire.

"*The Court:* It is let in for the purpose of showing what the defendant said when the character of this automobile that he had was called to his attention by the witness on the stand.

"*Mr. Wilkins:* What this witness said is not, certainly, to militate against the defendant. It is what the defendant said.

"*The Court:* That is competent too.

"*Mr. Wilkins:* There is nothing said about what the defendant said. It is what this witness said.

"*The Court:* That ought to be pursued for the purpose of discovering what the defendant said.

"*Mr. Wilkins:* There was no question asked as to that. It was simply remarks made by this witness; those are the only things that have been allowed to go in.

"*The Court:* Perhaps if it were pursued further it would get the defendant's response, because the defendant's response or failure to respond is what makes the remark of the witness at that time competent now.

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"*Mr. Wilkins:* That is what I objected to the other day. It is simply allowing prejudicial remarks made by other persons to go in evidence against this defendant. It is not shown this defendant said anything at all.

"*The Court:* You follow it up and see what the defendant said.

"*Mr. Voorheis:* Did Hammond make any response to this statement by you?

"*A.* He said the car that I saw up there was not a stolen car. There was quite some talk on that, but that was about all the nature of it. I told him I knew that was the car that was stolen from the doctor, and he said, 'No, that is not a stolen car.' And I said at that time, 'Why,' I said, 'if that is not a stolen car,' I said, 'let's go up there and take a look at it and see it;' and he said, 'It is not there any more; the man it belonged to has taken it away.' And I told him further than that; I told him that, unless he would see that everything in that barn that was stolen was returned, why, I would go down to police headquarters and tell what I knew about the tire that I had lost and where I had found it, etc."

Cross-examination:

"That was all the talk I can remember.

.."*Mr. Wilkins:* I ask that the testimony be stricken out. There is no remark made by the defendant shown, simply remarks made by this man about things to which the defendant made no reply. It is prejudicial to him.

"*The Court:* It may go in. Exception for the defendant.

"*Mr. Wilkins:* I move to strike it out, so as to save the record.

"*The Court:* Save another exception.

"*Witness:* He told me the automobile was not his, and the man that owned it had taken it away; that is the substance of the conversation."

That part of this testimony which relates to the accusation made by the witness to the effect that the automobile was stolen had been earlier elicited from the same witness, apparently without objection. And the witness had stated that he did not know that the

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automobile had been stolen but sought to convey to respondent the idea that he had such knowledge. That part of the testimony which refers to an automobile tire had not before been given.

Of the objections made to the introduction of this testimony, it is said in the brief for the people:

"In the case at bar it is uncontradicted that the defendant heard Dietsche's remarks and replied to them, saying, 'I don't remember any talk about an automobile tire;' and in reply to the second question as to whether Dietsche did not say at the same time that if Mr. Hammond would return the automobile he would not prosecute him or make any complaint for the taking of the automobile tire, Hammond said, 'No, I don't remember that he did.' Here was a proper foundation laid by these questions, the time, place, person, and the question in toto being understood by the defendant; and, when the defendant averred his lack of recollection of these questions, it became proper to impeach his testimony by calling the witness Dietsche in rebuttal. In *Smith* v. *People*, 2 Mich. 415, it was held that, if a witness neither denies nor admits having made any contradictory statements but says that he does not recollect having done so, his testimony may be impeached by proof of such statements. In *Pringle* v. *Miller*, 111 Mich. 663 [70 N. W. 345], it is held that when a witness was asked for the purpose of impeachment if he did not make certain statements, and replies that he has no recollection of making them, then the party asking the questions might call other witnesses to prove that they were made.

"It should also be remembered that the question asked of the defendant on cross-examination was, 'Now, didn't Dietsche say at that time that if you would return the automobile he wouldn't prosecute you or make any complaint for the taking of the automobile tire?' The defendant denied having any recollection of this question being asked him by Dietsche, and on rebuttal Dietsche testified that he did ask the defendant the question referred to, and further testified as to the defendant's reply thereto, which was, 'He [the defendant] said the car that I saw up there was not a stolen car.' Dietsche said

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further that 'I told him [the defendant] I knew that was the car that was stolen from the doctor and he said, "No, that is not a stolen car." '

"Now it is apparent that, if the defendant admitted to the witness Dietsche that the car was a stolen car, there could be no contention that such admission was not receivable in evidence. It was necessary to ask Dietsche the question in order to ascertain the defendant's reply, and when he testified that the defendant's reply was, 'No, that is not a stolen car,' that was all there was to it. There could be no prejudice committed against the defendant by letting in this testimony, because the defendant denied the accusation, and the witness Dietsche admitted that he denied it; and, as there was no other testimony on this point, there could be no doubt created in the minds of the jury because of this particular bit of testimony. It should be remembered that the entire conversation between Dietsche and Hammond, whether pertaining to an automobile tire or to an automobile, was so interwoven that it was practically impossible to ask questions of Dietsche or for Dietsche to make reply thereto without referring to both transactions.

"Counsel for the defendant, under the same heading, make further objection that the testimony of this conversation between Dietsche and Hammond tended to show another and distinct larceny, namely, that of stealing an automobile tire. If the defendant had admitted that there was a talk about a stolen automobile tire, and also that Dietsche had told him that if he [the defendant] would return the automobile he [Dietsche] would not prosecute him for the taking of the automobile tire, it is hard to see how such reply would have had any tendency to show that he had stolen an automobile tire. The questions were simply as to the conversation had between Dietsche and Hammond relative to the automobile; and, in order to bring out the entire conversation, it was necessary that the question of the automobile tire should also be mentioned; but the defendant certainly could not have been prejudiced before the jury by this fact, because Dietsche said that Hammond replied, stating simply that the automobile in question was not stolen. No further questions along this line were asked of

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the defendant, and his denial closed the incident. Dietsche was not asked as to whether or not Hammond had stolen an automobile tire, and it was not even intimated that such was the case.

Admitting, however, for the sake of argument, that the questions asked of Dietsche were such as having a tendency to show the commission of a separate and distinct crime by Hammond, inasmuch as the automobile which had been taken from Dr. Brady was found in the possession of the defendant, and his defense consisted in an effort to show that the car had come into his possession innocently and without any criminal intent on his part, it would seem that under the well-settled rule of law it would have been proper to have shown the commission of a crime of a similar kind and character for the purpose of showing the intent of the defendant in the case at bar."

The prosecution did not undertake to prove the commission of a similar offense, and it did not prove that respondent had stolen an automobile tire. It was entirely immaterial to the case for the people to prove that one or more persons had accused respondent of having stolen the automobile, unless in connection with such accusations respondent admitted that he had stolen it or knew that it was stolen or failed to make any reply.

But it is very suggestive and is prejudicial to a respondent charged with larceny when one or more persons are permitted to testify, in substance and effect, that they suspected respondent was a thief and so told him, even if they also testify that he denied the accusation. It is not difficult to imagine what would be the effect upon a jury of the testimony of five or six reputable men to the effect that they accused the respondent of stealing or of receiving stolen property, knowing it to have been stolen. The declarations of the accused, made in reply to the accusations, that he did not steal the property cannot be supposed to cure the mischief.

That respondent had testified that he could not re-

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member a portion of the alleged conversation afforded no reason for presenting the conversation to the jury. It would have been quite as proper to ask respondent if on some other occasion and with respect to some other property he had not been accused as a thief and, if he answered that he did not remember it, to confront him and the jury with his alleged accuser. Undoubtedly, whatever affects the credit of a witness is material, and there should be as little restriction as possible upon a course of procedure which will disprove a false witness. But the failure of a witness to remember immaterial facts does not open the door to testimony that the facts existed.

A witness, Fred Andrews, testified for respondent. Recalled by the prosecution for further cross-examination, he testified:

"I worked for the Michigan Central three or four times, about two years and a half or three years, all told, something like that. I would not say whether I worked for the Michigan Central in the year 1906. I don't just remember the year I did start. I would not just say how long it was distributed over. I worked in the roundhouse and I used to switch there and as a brakeman. I would not say how old I was when I started in. When I worked for the Michigan Central I always went by the name of Fred Andrews. My middle name is John—Frederick John Andrews—but probably I didn't put in the John. I do not know just what I did put down in the application. I might have put Frederick, and I might have put Frederick John. I do not know; I did not use any other names.

"*Q.* Isn't it a fact that you went to work for the Michigan Central on the 24th day of January, 1906; that you filed your application on the 15th day of January, 1906, and that you worked to March 10, 1906, and that was the last time and the only time that you worked for the Michigan Central? * * *

"*A.* No, sir. * * *

"*Q.* That is not a fact, then?

"*A.* No, sir; I worked three or four—I cannot say whether it was three or four times. During that

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time, between the dates given, I would not say that I was or was not working for them. I do not know; but I worked there anyway. I do not just remember the dates that I did work there. Besides the time that I worked in the roundhouse, I got a job braking for the Michigan Central and I got a job switching after that. Some of the time I was on a run out from Detroit to Jackson and other places, when I was braking. Mr. Comstock did not hire me when I got switching. He hired me for braking. I could not just say how long I worked for the Michigan Central. I do not remember; it might have been a year and a half; might have been a year; I would not say."

Thereupon the prosecution called a witness who testified that he was timekeeper for the Michigan Central Railroad from December 8, 1908, to the date of the trial, and that it was his duty to keep time for all trainmen and yardmen. He was asked to state the custom of his department relative to the records made of applications of those desiring employment. He answered:

"When a man desires employment, he goes to the trainmaster, and if the trainmaster wants to hire him he tells his clerk to hire this gentleman, and he makes out an application, a copy of which you have there, and then when an application is made out the man that hires him keeps a copy of it and sends the man to be examined. * * * The record of these applications is kept in the impression book, of which I have charge.

"*Q.* I show you this book which is marked 'Employment, February 15, 1905, to January 21, 1906,' and ask you if that is the book kept by you of such applications? * * *

"*A.* They are copies.

"*Q.* Those purport to be copies of certain writings?

"*A.* Yes, sir. * * *

"*Q.* I will ask you as to what record you find in that book relative to any application as made by Fred Andrews, Frederick Andrews or Frederick John Andrews, during the time covered by that book? *

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"*A.* This book shows that Frederick John Andrews was hired as a freight brakeman on January 15, 1906. * * *

"*Q.* Do you find any record of any other application made by Mr. Andrews for employment during the time covered by this book? * * *

"*A.* There is no other records of this man in this book. (The book is considered marked Exhibit A.) I have made no search of the same records from the time of the expiration of this record down to the present time. The records at the time when a man goes to work and when he ceases working for the railroad in my department are kept in the time book, which is this book marked 'Time Book,' which covers the period November, 1905, to July, 1907, and which is also kept in my office.

"*Q.* I will ask you to refer to that book and tell the court and jury what this shows relative to the employment of Andrews during the time covered by the book. * * *

"*A.* The first trip Mr. Andrews made was on January 21, 1906, to Toledo. * * * The last trip he made was on the 10th day of March, 1906, coming from Jackson to Detroit. And the book shows that he got a time check some time in March which paid him for the full time worked in March. I have looked half-way through this book, but I could not find any other record or records of his working for the Michigan Central to October, 1906.

"*The Court*: Where did you get this book?

"*A.* In the superintendent of terminals' office. It is part of the records of our office, and that is where I got it. My office is timekeeper. The office out of which I took this is the superintendent of terminals. That is the only record of the time the men put in during that period. The record that our company keeps."

On cross-examination he testified:

"I am not timekeeper for the whole Michigan Central system, just for Bay City, Toledo division. The time of the men running to just Toledo and Bay City is kept in these books. I know as to how the books were kept prior to the time I came in there. I was assistant to the timekeeper. I first entered the em-

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ploy of the Michigan Central Railroad February 8, 1905. I was car checker at that time and became assistant timekeeper in July, 1907. Prior to that time I had nothing to do with keeping any records in the office of the superintendent of terminals; anything prior to that time I know nothing of. As to matters I have testified to from July, 1905, down to the time I went in there in 1907, they are book records, and I do not know how the books were kept at that time, except as the books show themselves. I do not know whether they are correct. I do not know whether at those times a record of all the men running out of Detroit was kept in the office of the superintendent of terminals or not, prior to the time I went in there. From 1905, down to 1907, I cannot tell whether those records contain a complete record or those books a complete record of all the men running out on Jackson and Toledo division."

This testimony was received over repeated objections to its competency and materiality, and motions to strike it out were denied. Of it, it is said in the brief for the people:

"It is therefore respectfully submitted that in view of the fact that witness Andrews was impeached, and he shown to be a man unworthy of credit by reason of his denials of remembrance of three convictions of offenses under the laws of this State, which offenses it was shown positively by the records of the police court of the city of Detroit had been committed by him, it was impossible to further discredit the said witness Andrews before the jury or to render his testimony less worthy of belief, and that the allowing of the testimony of witness Miller, contradicting statements of Andrews, relating to his employment with the Michigan Central Railroad Company, could not prejudice the defendant in any way whatsoever, and that the permitting of such testimony does not constitute reversible error; this being further particularly true in view of the clear and explicit instructions of the trial judge upon the matter, as above set forth."

We know of no rule of evidence which sustains the

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ruling that his recollection (or his truthfulness) could be contradicted by a private record, the contents of which were not shown by any witness to be a record of facts. It was hearsay testimony purely.

Requests were made to the court to charge the jury that, in order to warrant a verdict of guilty, each and every one of the jury must be convinced beyond a reasonable doubt of the defendant's guilt. The charge of the court as given was as follows:

"This, gentlemen of the jury, is largely a case of circumstantial evidence. You are to take all the testimony in the case, all the various circumstances which have been testified to here by the various witnesses, and ask yourselves whether or not they satisfy you beyond a reasonable doubt that the defendant at the bar either himself or by or through another joined with him in an illegal agreement to commit this crime, the commission of which the defendant in some way aided, took and carried away this car, the personal property of Dr. Brady, without any color of right for so doing, and with felonious design to permanently deprive Dr. Brady of the possession of it.
* * *

"Now, to recapitulate finally, gentlemen of the jury: Are you satisfied beyond a reasonable doubt that the defendant at the bar himself took and carried away the personal property of Dr. Brady, namely, this automobile, without any color of right for so doing and with the felonious design to permanently deprive him of the possession of it? Then he is guilty, if he did. If you are not satisfied of that, are you satisfied beyond a reasonable doubt that he, by or through another joined with him through an illegal conspiracy to commit this particular offense, did aid in the commission of it by the other and that other took and carried away this personal property, this automobile of Dr. Brady, without any color of right for so doing and with the felonious design to permanently deprive him of the possession of it? Then the defendant is guilty, because, if he entered into an illegal agreement with some other person to commit a crime and in any way aided in the consum-

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mation of that illegal agreement, what one did is the act of both."

The case of *People* v. *Hare*, 57 Mich. 505 (24 N. W. 843), is called to our attention. In that case, as was said in *People* v. *Curtis*, 97 Mich. 489, 490 (56 N. W. 925, 926):

"It does not appear that the court instructed the jury at all upon the subject, but, on the contrary, said that it was not the duty of the court to charge individual members."

As stated in the opinion last referred to, it must be presumed that jurors are possessed of common sense. A reading of the portions of the charge of the trial court above quoted convinces us that it could not have been misunderstood by the jury and sufficiently apprises them of their rights and duties.

A request was made to charge the jury as follows:

"Now the respondent has taken the stand and testified in his own behalf, and I charge you that his testimony is to be tested the same as that of other witnesses, and that, if rational, natural, and consistent, it may outweigh the testimony of all other witnesses."

The request was refused and error is assigned thereon. We cannot escape the conclusion that it was error not to give this request or cover it in the general charge, under authority of *People* v. *McArron*, 121 Mich. 1 (79 N. W. 944). Our attention is challenged by the prosecuting attorney to the dissenting opinion of Mr. Justice GRANT in that case, when he said at page 44 of 121 Mich. (79 N. W. 959):

"The fourth request was sufficiently covered by the general charge in regard to the credibility of witnesses. I see no reason why the respondent should have been singled out, and attention especially called to his testimony. We are cited to no case which holds that to be essential. The language of the request would apply equally to any other witness. Where conviction depends mainly upon one witness for the people, such an instruction in regard to his testimony would

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be a correct statement of the law, but such an instruction would sound strange when so applied. The jury were instructed that the weight of evidence was for them entirely. Every juror of average intelligence knows this, without being so instructed, and also knows that he can believe or disbelieve any witness. When one on trial for a crime becomes a witness and is, by the instruction of the court, placed on the same basis as other witnesses, he has received all the protection in this regard which the law gives him. The same rules of evidence apply to him as to others, and the practice of calling special attention to one witness has been condemned."

It will be noted that even this opinion was based upon the ground that the general charge as to the credibility of witnesses sufficiently covered the request. No instructions were given in the instant case as to the weight to be given to the testimony of witnesses generally.

The other errors complained of relate to the charge of the court; and, while the learned judge did not follow the language of the written requests, he covered them sufficiently in his general charge. *People* v. *Swartz,* 118 Mich. 292 (76 N. W. 491); *People* v. *Quimby,* 134 Mich. 625 (96 N. W. 1061).

For the reasons stated, the conviction is set aside and a new trial granted. The respondent will be delivered to the custody of the sheriff of Wayne county.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ., concurred.

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ATTORNEY GENERAL, *ex rel.* BAUM, *v.* CITY OF SAGINAW.

1. MANDAMUS—EQUITY—PENDING SUIT.

On mandamus to compel the holding of a special election, as appointed by the charter commission of the city of Saginaw, the remedy will not be withheld because another suit in equity is pending wherein the validity of the "home rule" statute is attacked, the chancery court having issued no injunction or restraining order to prevent proceedings thereunder.

2. SAME—MUNICIPAL CORPORATIONS—ELECTIONS.

The claim of respondents that there is insufficient time to comply with all the statutory requirements is not a defense, but the provisions as to time for registration, etc., not being mandatory in their character, respondents will be compelled to act as near as may be in accordance with law.

Mandamus by the attorney general, on the relation of William B. Baum, against the city of Saginaw and others. Submitted October 30, 1913. (Calendar No. 25929.) Writ granted October 30, 1913.

J. F. O'Keefe, for relator.

A. Elwood Snow, City Attorney, for respondents.

PER CURIAM. In this case application is made by the attorney general, on the relation of the charter commission of the city of Saginaw, for a mandamus to compel the common council of said city to take the necessary steps to hold a charter election on November 15, 1913, the date fixed for such action by said commission.

It is contended on behalf of respondents that they should not be compelled to proceed to an election at this time because an appeal is now pending in this court involving the question of the constitutionality

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of the home rule act, so called. *Goodman* v. *City of Saginaw.* No injunction nor restraining order was ever issued in said chancery cause, and the bill was dismissed October 18, 1913, since which time respondents have been at liberty to proceed with their labors, as directed by law. We can see no reason for holding that the mere fact that that cause is now pending constitutes any valid excuse for delay.

It is further argued by counsel for respondents that at this time, October 30th, there can be no valid action taken by the respondents providing for an election on November 15, 1913, for the reason that the various statutory or charter provisions relative to elections cannot now be complied with.

In view of the provisions of section 26 of Act No. 279, Pub. Acts 1909 (2 How. Stat. [2d Ed.] § 5467), we are of opinion that the provisions adverted to are not mandatory. We have held that boards and public officers may be compelled to act even after the time limited for action had expired, where through a mistaken sense of duty they had refused or omitted to perform statutory duties. *Attorney General, ex rel. Graves,* v. *Mayor, etc., of Adrian,* 164 Mich. 143 (129 N. W. 44).

Upon the argument it was made to appear to the satisfaction of the court that sufficient time yet remains to provide for registration, and that no elector will be denied his right of franchise by reason of the shortening of the time. It is to be presumed that respondents will in good faith at once proceed to take the necessary steps to provide all reasonable opportunity to register "as near as may be" to the charter provisions.

Respondents make as part of their return the following statement:

"These defendants admit the allegations in the third paragraph of said petition, with the exception

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that they deny that the charter commission formulated and adopted a revision of the charter of the city of Saginaw as provided by Act 279 of Public Acts of 1909; this denial being made because of the decision of this court in the case of *Eikhoff* v. *Charter Commission* [176 Mich. 535 (142 N. W. 746)]."

We are of opinion that the language relied upon in the *Eikhoff Case* is not controlling. The question now involved was not in issue there. The point there under consideration was whether or not the charter commission was a legislative or other body possessing the power of amotion.

The writ will issue, but without costs.

PEOPLE, *for use of* YOUNG, *v.* NEDERLANDER.

PRINCIPAL AND SURETY—NOTARY PUBLIC—FRAUD—BOND OF NOTARY—EXTENT OF LIABILITY—ACKNOWLEDGMENT.

For such damages only as are the proximate result of a notary's false or fraudulent certificate his surety is liable. One who parts with money upon false statements of a notary, afterwards receiving a forged deed with his fraudulent certificate, cannot recover on the bond. The misrepresentations, not the bond of the notary, constitute the proximate cause.

Error to Wayne; Van Zile, J. Submitted October 10, 1912. (Docket No. 29.) Decided November 3, 1913.

Assumpsit by Edward Young and wife in the name

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of the people of the State of Michigan against George H. Reissman, principal, and Joseph Nederlander, surety, on the bond of Reissman as a notary public. Judgment for plaintiff. Defendant Nederlander brings error. Reversed as to appealing defendant.

Bernard Goldman (Bumps & Bishop, of counsel), for appellant.

Hearn, Sherman & Chapman, for appellee.

BIRD, J. This action was instituted to recover for a breach of the notarial bond of defendant Reissman. The plaintiffs had judgment against both Reissman and his surety, Nederlander, in the trial court, and defendant Nederlander, who alone defended, assigns error thereon.

It appears that on September 12, 1910, defendant Reissman sold to plaintiffs, upon contract, two lots in the city of Detroit, for a consideration of $1,000, $500 of which was paid down, leaving a deferred payment of $500. Less than 30 days thereafter, Reissman sought out the plaintiffs, and represented to them that his client was desirous of having her money, and that she was willing to discount the remaining payment $50, if paid at once. Plaintiffs took advantage of this offer and made the payment to Reissman, and received from him a warranty deed of the lots, purporting to be executed by the owner. The deed bore the names of two witnesses and the notarial certificate of defendant Reissman. It turned out and appeared to be conceded on the trial that Reissman had no authority to act for Elizabeth Auberey, the owner of the lots, and that the deed was a forgery.

At the close of plaintiffs' case, the defendant requested a directed verdict. This was refused, and a verdict for $950 was directed for the plaintiffs. This action of the trial court is assigned as error. The

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contention of the defendant is that no recovery could be had for the reason that, under the plaintiffs' own proof, it was shown that they did not part with their money in reliance upon the genuineness of the certificate to the deed. The general rule governing actions like the present one against notaries and their sureties is stated as follows:

"If the officer who takes an acknowledgment makes a false certificate, an action on his official bond for the damages sustained by reason thereof will lie against him or his sureties, though it seems that such recovery may be had only where the damages sustained are the proximate result of the false certificate." 1 Cyc. p. 628.

See, also, *Wyllis* v. *Haun*, 47 Iowa, 614; *Oakland Bank of Savings* v. *Murfey*, 68 Cal. 455 (9 Pac. 843); *Nolan* v. *Labatut*, 117 La. 431 (41 South. 713); *People* v. *Butler*, 74 Mich. 643 (42 N. W. 273).

Mrs. Young testified that she paid the $450, the balance on the contract, on September 28th, and that when she did so, Reissman gave her a receipt therefor and advised her that he would have the deed recorded and bring it to her. The next day, on September 29th, he delivered the deed as promised, and that was the first time she had seen it. Under her own testimony, it is obvious that she did not pay the money in reliance upon any official act of Reissman; but that she did pay it upon his unofficial statements and promises. When she parted with her money, she had not yet seen the notarial certificate, and it does not appear that she knew Reissman was a notary public. In fact it does not appear from the record that the deed was actually prepared at the time she made the payment. Had Reissman absconded immediately after receiving the payment, and not delivered the forged deed, the position of plaintiff with reference to her money would have been the same. That plaintiffs were grossly defrauded by Reissman

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does not admit of doubt, but defendant Nederlander, as surety, must not be made to suffer therefor unless some act of Reissman as notary has deceived and defrauded them. The surety would not be liable to the plaintiffs for the fraud of Reissman as an individual. The undertaking of the surety was one "for the faithful discharge by said George H. Reissman of the duties of his office without fraud as a notary public." The failure of the plaintiffs to show that the loss sustained by them was the proximate result of Reissman's official misconduct or fraud renders their case against the surety without merit.

For this reason the judgment against the surety must be reversed, with no new trial granted.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and OSTRANDER, JJ., concurred.

SLACK v. CURRY.

1. EVIDENCE—NEGLIGENCE—CUSTOMS AND USAGES—MACHINERY—CHILDREN—DUTY TO GUARD MACHINERY.

   On the trial of a personal injury action, wherein plaintiff claimed that defendant neglected to guard or protect one of his pulleys, used in moving a building, and that a child of two years caught his hand in it as a result of defendant's negligence, testimony that defendant employed the usual appliances of persons moving buildings, was not incompetent or inadmissible in evidence.

2. SAME—PERSONAL INJURIES—INFANCY.

   The custom of defendant's employees in protecting children was not a proper subject of testimony: the error

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committed in receiving such evidence was not, however, prejudicial, where the witnesses testified in detail what they did on the day of the accident to protect children.

3. SAME—APPEAL AND ERROR.

And any error that the court may have committed in receiving testimony that the infant was in the charge of a ten-year old boy, who said he lived with the family to care for the children, was cured by the charge of the court that plaintiff was not chargeable with contributory negligence on account of his extreme youth, and that the negligence of his parents could not be imputed to him.

Error to Kalamazoo; Knappen, J. Submitted October 17, 1912. (Docket No. 125.) Decided November 3, 1913.

Case by Harold Ray Slack, an infant, by next friend, against Samuel E. Curry for personal injuries. Judgment for defendant. Plaintiff brings error. Affirmed.

Jackson & Fitzgerald, for appellant.

Harry C. Howard, for appellee.

BIRD, J. While defendant was engaged in moving a house on Forbes street in the city of Kalamazoo, the plaintiff, a boy of two years of age, took hold of a wire cable which was passing through a pulley and his hand was drawn into it and a portion of his thumb amputated. The pulley was fastened to a telephone pole in front of plaintiff's home, near where he was accustomed to play. The negligence with which the defendant was charged was his failure to protect the pulley with a mechanical guard and also for his failure to keep plaintiff away from the cable and pulley. A trial resulted in a verdict for defendant, and plaintiff complains of several errors committed by the trial court during the course of the trial.

The defendant was permitted to show that the

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agencies employed in moving the building were the usual and customary ones in moving buildings, and that it would destroy the usefulness of the pulley to place a mechanical guard over or around it. This testimony was taken subject to the plaintiff's objection that it was incompetent to show what the custom was of other movers in that vicinity, and he argues that, because other movers were negligent, it would not excuse the negligence of the defendant. This testimony was admitted by the court, and the jury instructed that they had a right to consider it in determining whether the defendant was guilty of the negligence charged. We are of the opinion that this testimony was admissible. No complaint is made that the defendant was committing an unlawful act in moving the building upon the highway. The complaint in the declaration is aimed at the manner of doing the act. Ordinarily, when the question arises as to whether the doing of a lawful thing is done in a negligent manner, such testimony is admissible. *Larson* v. *Ring*, 43 Minn. 88 (44 N. W. 1078); *Kelly* v. *Railway Co.*, 28 Minn. 98 (9 N. W. 588); *Kolsti, An Infant*, v. *Railway Co.*, 32 Minn. 133 (19 N. W. 655); *Missouri, etc., R. Co.* v. *Holley*, 30 Kan. 474 (1 Pac. 554); *Boick* v. *Bissell*, 80 Mich. 260 (45 N. W. 55).

Complaint is also made because several witnesses were permitted to testify as to what the custom of defendant's employees was in watching and protecting the children who might gather around the apparatus. This testimony appears to be objectionable on the ground of incompetency *(Blanchette* v. *Railway Co.*, 175 Mass. 51 [55 N. E. 481]), but we do not think that the case should be reversed on this ground, as nearly all of the witnesses, after testifying upon the subject of custom, went into detail and related what was done by them on this particular day in protecting the children. Of course it was not

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important as to what they were accustomed to do; it was what they actually did in watching and protecting the children that was important in determining the care which was exercised.

It appeared in the testimony that the plaintiff was left by the mother shortly before the accident in the care of Ray Hartkee, a boy 10 years of age, who was living in plaintiff's family. Hartkee testified upon cross-examination, over plaintiff's objection, that the reason the Slacks had him in the family was to take care of the children. It is said that this testimony was incompetent and harmful because it carried with it the inference that the mother was careless in caring for him and therefore contributed to his injuries. If this view were taken by the jury, it must have been dissipated by the charge of the court wherein he made it very plain that the plaintiff could not be charged with contributory negligence on account of his extreme youth, and further that he could not be charged with the negligence of his parents. By reason of this instruction, we think no harm resulted to plaintiff's case.

Several exceptions are taken to the charge of the court. Most of them involve the same questions as are raised by the objections to the admissibility of the testimony.

The charge in its entirety was a fair one, and we think the judgment of the trial court should be affirmed.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, and STONE, JJ., concurred with BIRD, J.

OSTRANDER, J. *(concurring).* The brief for plaintiff and appellant is confined to discussion of certain alleged errors relating to the admission of testimony and to the charge of the court. The testimony objected to is substantive testimony offered by the defendant after plaintiff had rested as to the custom

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of others in moving houses along the street and the custom of the defendant's own men. Error is also assigned upon a ruling refusing to strike out a single bit of evidence elicited on cross-examination from one of the witnesses for plaintiff. All of the rulings complained about are unimportant in view of the declaration of the plaintiff and the testimony offered in behalf of the plaintiff. The duty of the defendant "to provide a guard or protection so as to prevent this plaintiff from going near or coming in contact with said rope, wire, chain or cable, or the said wheel or pulley, and that it was the duty of the said defendant to so guard the said rope, chain, wire or cable, and the said wheel or pulley so that this plaintiff would not be injured as hereinafter described," is variously alleged in the declaration, but the proof that any such duty existed seems to me to be wholly lacking. It appears, it is true, that plaintiff, a two-year-old child, took hold of the wire cable running through a block and his hand was injured. It seems to be apparent that, if any person had in like manner taken hold of the wire cable when it was moving toward the block, he might have been injured. But it is not made to appear by allegations in the declaration or by plaintiff's testimony that the defendant owed any duty to use any other or different apparatus than the one in use; that the apparatus was in any way strange or the manner of using it not the common and proper way. Although the case does not seem to be relied upon by counsel for the plaintiff, *O'Leary* v. *Telephone Co.*, 146 Mich. 243 (109 N. W. 434), is the one which upon the facts comes nearest the case at bar of any decided by this court. In that case the justices were divided in their opinions, and in the opinions considerable reference is made to other decisions; the majority opinion sustaining the proposition that defendant's liability was a question for the jury is based entirely upon the fact that

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children were meddling with the apparatus to the knowledge of the defendant's agents, a fact not present in the case at bar. See, also, *Iamurri* v. *Gas Co.*, 148 Mich. 27 (111 N. W. 884). Therefore, whether the testimony introduced by the defendant showing the custom of other house movers or the custom of his own men was rightly or wrongly admitted is wholly immaterial; and, inasmuch as the trial judge might very properly have directed a verdict at the close of plaintiff's case, there is no occasion to discuss the assignments of error based upon the charge. The jury returned a verdict for the defendant, and any other verdict should have been set aside by the court. The judgment ought to be affirmed.

DAHROOGE *v.* ROCHESTER GERMAN INSURANCE CO.

1. INSURANCE—LIMITATION OF ACTIONS—CONDITIONS OF POLICY.
   An action upon a Michigan standard policy of fire insurance must be brought within a year from the date of the fire. Act No. 277, Pub. Acts 1905 (3 How. Stat. [2d Ed.] § 8328).

2. SAME—ESTOPPEL—PROMISE TO PAY LOSS.
   And the period is not extended by mere assurances that the loss would be paid, offered by defendant's adjuster during negotiations of settlement. Waiver must arise by express agreement, from a new promise to pay or out of part payment or failure to plead.

3. WAIVER—WORDS AND PHRASES.
   A waiver is a voluntary relinquishment of a known right.

4. INSURANCE—ESTOPPEL.
   Where plaintiff, acting under legal advice, entered into

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negotiations with defendant's adjuster, and was put off from time to time with assurances that the parties would get together, or that defendant would pay the loss, or not to sue, that the adjuster was busy and would take up the matter later, so that the insured delayed starting legal proceedings until two or three months before the expiration of the year, and where two actions failed or were abated, and service was not secured until four months in excess of the year had elapsed, defendant was not liable on any theory of estoppel or waiver.

5. LIMITATION OF ACTIONS—FIRE INSURANCE—STATUTES.

3 Comp. Laws, § 9738 (5 How. Stat. [2d Ed.] § 14145), extending the time for commencement of suit one year after failure, abatement, or dismissal of any action instituted within the period of limitations, has no application to a fire insurance policy of standard statutory form.

BIRD, J., dissenting.

Error to Kent; Perkins, J. Submitted October 17, 1912. (Docket No. 124.) Decided November 3, 1913.

Assumpsit by George Dahrooge and Maggie Dahrooge against the Rochester-German Fire Insurance Company upon a policy of insurance. Judgment for defendant on a verdict directed by the court. Plaintiffs bring error. Affirmed.

Powers & Eardley, for appellants.

Norris, McPherson & Harrington, for appellee.

STEERE, C. J. A judgment was rendered against plaintiffs and appellants in this case on a directed verdict, for the reason that the action was not begun until several months had elapsed after the expiration of one year from the time of the fire which it was claimed destroyed property of plaintiffs covered by the policy of insurance upon which suit was brought. Plaintiffs are husband and wife and resided on Wealthy avenue in the city of Grand Rapids, Mich.,

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where they also conducted, in a portion of their residence, the business of manufacturing silk garments. They had resided there and been so engaged for nine years previous to the time in question, and had carried insurance with defendant on their property for six or seven years.

On May 19, 1910, a policy for $1,500 was issued to them, through W. H. Van Leeuwen, the agent of defendant, on their building, and its contents while occupied as a dwelling, on Wealthy avenue. This policy bore a mortgage clause making the loss, if any, payable to a named mortgagee, as her interest might appear. In the summer of 1910 plaintiffs desired to make a change in this policy, and the husband, George Dahrooge, visited Mr. Van Leeuwen, the agent, with the policy, requesting him to change it over so as to cover the stock and machinery in the building, informing him fully of the location and value of the property and the condition of the title. The agent made the change, on August 13, 1910, by canceling two riders on the policy, containing a description of building and contents and the mortgage clause, and attaching another rider providing an indemnity, in case of loss, of $200 on sewing machines and fixtures, and $1,300 upon stock and materials connected with their manufacturing business. There was other concurrent insurance on the property, in relation to which no question is raised. A fire occurred on the premises October 14, 1910, about 6 o'clock in the morning, partially consuming the building and totally destroying the stock on hand, also seriously damaging the machinery.

Notice was given at once to the local agent, who visited the property and informed plaintiffs that an adjuster would be sent. Two or three days later a Mr. Bartells, acting as adjuster for defendant, came and looked over the premises, being furnished by plaintiffs with all the information he desired and

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given access to books and bills then on hand and which had survived the fire. At his suggestion duplicates of bills lost or destroyed were procured from where the goods were purchased, and produced later when Dahrooge was examined under oath at the instance of defendant in January following. The assured transmitted, with schedule of property claimed to have been destroyed, to defendant, proofs of loss on November 30, 1910. These proofs were made out on a blank defendant had furnished. Assured appears to have been represented by counsel at that time, who, on December 17, 1910, wrote defendant, stating that the proofs of loss and inventory had been mailed to it on November 30th, but receipt had not been acknowledged, asking for a reply; again writing on December 24, 1910, advising of the two previous communications, and noting that they had not yet been favored with the courtesy of a reply, asking acknowledgment of previous communications and information as to what defendant proposed to do. To this, on December 28, 1910, defendant, through its manager, replied:

"The matter to which you refer is in the hands of our Mr. H. A. Bartells, Home Bank Building, Detroit, Michigan."

Another letter of March 6, 1911, acknowledging a letter from said attorneys, of the 2d inst., stated:

"Have passed the matter on to our Mr. H. A. Bartells," etc.

The testimony shows without controversy that the assured, as often as requested, exhibited to the person or persons designated by the defendant the place and remains of any property from the fire, submitted to examination under oath and produced for examination the books and accounts, bills, invoices, and other vouchers, or certified copies thereof, allowing the same to be examined, and any copies or extracts

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desired to be made by defendant's representatives. Plaintiffs' testimony was that the cash value of the machinery in the building amounted to $956.90, and the loss thereon $428; the cash value of the stock being $3,263.76, and the loss thereon total, the same being entirely destroyed by fire; making total loss as the result of the fire $3,691.76, the value of the property being given as $4,520.66. This action was begun January 27, 1912, one year three months and thirteen days subsequent to the fire, which occurred October 14, 1910.

Plaintiffs' declaration was upon their policy, in proper form under Circuit Court Rule 3 *(c)*. Defendant pleaded the general issue, adding to such plea a special notice, under Circuit Court Rule 7 *(d)*, of various breaches of conditions, stipulations, etc., contained in the policy, and that action was not commenced within the statutory period after date of the fire alleged in plaintiffs' declaration. As the case is presented only the last feature of said notice demands attention.

On the trial defendant introduced no testimony, and, after plaintiffs rested their case, moved the court to direct a verdict in its favor, for the reason that it appeared from the undisputed evidence that the action was not commenced within 12 months next after the fire. This motion was granted.

A subsequent motion of plaintiffs for a new trial was denied, for reasons already stated by the judge to the jury in his charge when directing a verdict for defendant, the pertinent parts of said charge being as follows:

"The statute expressly provides that suit shall be brought within 12 months from the time of the fire. The only way in which that statute can be abrogated would be by showing that the company had done something, or was responsible for some act, which led the plaintiffs into the belief that their claims

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would ultimately be paid—some act upon which the plaintiffs had a right to rely, and upon which they did rely, thereby creating an estoppel against the defendant company on account of the delay. I fail to see from the evidence anything which prevented the plaintiffs from bringing their action within the 12 months, so far as the defendant company is concerned. In fact they did bring their action within the 12 months; they brought two suits, both of which failed on account of defects which are unnecessary to be mentioned at this time. * * * Those cases failed, and some months after the expiration of the year they brought this suit, and now claim that the company is estopped from raising this defense or from making this defense under the statute by reason of its conduct; that they were led to believe * * * that their claim would be paid, by the action of the company or its agents, and that they relied upon the promises and statement of the agent of the company, and waited until the year had expired before they commenced their suit; that position is inconsistent with the admitted facts in the case. * * * I think the statute is a salutary one, and that the court is bound to obey it. * * * The equities of the case are not for the court at this time. It is a legal proposition, pure and simple, as to whether or not their action was commenced within the statutory period. Clearly it was not."

Plaintiffs contend that the court erred in its conclusions for two reasons, summarized as follows:

"That the 12 months in which suit must be started had not expired at time present suit was started; and, even though it had expired, the time was extended by defendant's conduct and dealings with plaintiffs."

The policy involved in this case is a Michigan standard fire insurance policy of the form prescribed by Act No. 277, Pub. Acts 1905 (3 How. Stat. [2d Ed.] § 8328). The use of this form was compulsory upon the parties in effecting the insurance. It requires that immediate notice of the fire shall be given, and proof of loss furnished within 60 days; that insured, as often as required, shall submit to examina-

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tion under oath by any person named by the company, and shall produce all books of account, bills, invoices, etc., and that "the loss shall not become payable until 60 days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company," etc., and that "no suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within 12 months next after the fire."

It is contended by plaintiffs that the period of 12 months in which the action must be brought only begins to run from the time in which the cause of action accrues, which would be, at the earliest, 60 days from the time of full compliance with the requirements mentioned; that though they acted promptly in all particulars and complied with all requests and demands of defendant, they had no right of action until 60 days after January, 1911, being the time when, at the request of defendant, Dahrooge submitted to examination under oath. Numerous authorities are cited from various jurisdictions in support of this contention. Many of them involve policies purely contractual, containing similar provisions to those in our standard policy, but voluntarily prepared and adopted by the insurance companies for their own protection. Even in that class of cases there is conflict, though it may be conceded the majority of decisions tend to sustain plaintiffs' contention. Where there are Michigan decisions on the subject we need look no further.

In *Barry & Finan Lumber Co.* v. *Insurance Co.*, 136 Mich. 42 (98 N. W. 761), it is said of a policy containing a similar limitation to the present one:

"It is settled that, under a provision like the one in this policy, a plaintiff cannot ordinarily recover, unless his action is begun within 12 months" (citing

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nine Michigan cases, amongst which are *Law* v. *Accident Ass'n*, 94 Mich. 266 [53 N. W. 1104], which contained identically the same provision relative to time of bringing suit found in our standard policy).

In that case negotiations and attempts to settle were conducted for between six and seven months, leaving but a little over five months within which suit could have been brought before the 12 months expired. The action, however, was not brought until upwards of 14 months had expired. The question of waiver was raised, but the court held that nothing was done by defendant which could be construed as a waiver of this substantial right expressed in the policy; that the suit should have been brought within the year specified, and, not having done so, plaintiff lost his right of action. Also, *Lentz* v. *Insurance Co.*, 96 Mich. 445 (55 N. W. 993), involving a policy limiting the time when suit could be brought to six months. A fire occurred on October 23, 1889. Action was begun May 5, 1890—six months and twelve days after the fire. The court held that this delay operated to bar recovery unless excused by act of the company. It is stated that on the 22d of December, 1889, defendant's agent informed plaintiff that the company denied any liability. The court, speaking through Justice MONTGOMERY, said:

"He now treats the repudiation of liability as excusing him from furnishing any proofs of loss, and justifying an action on the policy. Assuming that he is right in this contention, it unfortunately demonstrates that he was not delayed in bringing suit by the negotiations. Had he furnished proofs of loss the day the fire occurred, the company would have been entitled to 60 days within which to make payment, by the terms of the policy. He could not, therefore, have brought suit earlier than December 22d. He now brings suit without furnishing proofs of loss, on the claim that the company's refusal to pay waived

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such proofs. This he was entitled to do on December 22, the earliest day at which he could have brought suit had he furnished proofs."

One of the strongest cases cited and relied upon by plaintiffs is *Steen* v. *Insurance Co.*, 89 N. Y. 315 (42 Am. Rep. 297), which was decided before adoption of a standard policy in the State of New York. That case is fully in harmony with plaintiffs' contention here, holding that the limitation should be construed as running from the time when the loss becomes due and payable, and not from the time of the fire, and refers with disapproval to Massachusetts and Illinois decisions holding that the time begins to run when the fire occurs. Subsequent to the adoption of a standard policy in the State of New York the same court, in the case of *Hamilton* v. *Insurance Co.*, 156 N. Y. 327 (50 N. E. 863, 42 L. R. A. 485), passing upon a similar clause in a standard policy, said:

"The policy in this case was a standard fire insurance policy, * * * and was issued under and in pursuance of a statute, * * * . The only policy the defendant had a right to issue was that authorized by that statute, and the policy in suit contained only such provisions, agreements, and conditions as were specially authorized and required by it. The provision limiting the time within which an action thereon should be commenced to the period of one year, was inserted in obedience to the statute. * * * Therefore, it is manifest that the statute specially prescribes the limitation of time within which an action upon a fire insurance policy upon property in this State shall be commenced. * * * It was not, however, made a part of the policy by virtue of any agreement of the parties, but by the command of the statute. * * * The law establishes the period of limitation, and forbids the parties from disregarding it."

In that case the fire occurred January 16, 1892. Summons was issued and put in the sheriff's hands January 14, 1893, but he failed to serve it until the

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17th, which was held to be too late. Our present standard policy is copied from that of New York. The policy there under consideration contained exactly the same provisions and requirements, that loss shall not be payable until 60 days after notice, ascertainment, estimate, proof of loss, etc., upon which plaintiffs rely here to extend the time for bringing action beyond the 12 months. Standard policies similar to that before us have been adopted, and their use made compulsory by statute in many States. It has been repeatedly held, in passing on their various provisions, that they should be construed according to the plain meaning of the language used, and that the trend of authority is towards enforcing the legislative command when clearly expressed, rather than to nullify and modify by strained constructions. The provision that an action cannot be sustained "unless commenced within twelve months next after the fire" is very plain, clear, and simple language. If it was the legislative intent that this should have other than the natural meaning, it would have been a simple matter to have so provided. In Richards on Insurance Law (3d Ed.), § 327, it is said:

"By the better authority the period of limitation begins to run, under the standard policy, from the date of the fire, as specifically stated" (citing many cases).

It is further contended in plaintiffs' behalf that the time for bringing action was extended by waiver, or estoppel, arising from negotiations for settlement, extending from the date of the fire in October until the following July, during which time defendant's adjuster gave repeated assurances that the loss would be paid. It has been said that a waiver must arise either by express agreement, a new promise to pay, a part payment, or a failure to plead. A waiver is

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a voluntary relinquishment of a known right. Estoppel is based on some misleading conduct or language of one person which, being relied on, operates to the prejudice of another, and is applied to the wrongdoer by the court in denial of some right, which otherwise might exist, to prevent a fraud. The claim of plaintiffs in this case seems rather to suggest an estoppel, though in insurance cases the terms are freely used interchangeably, and it is sometimes expressed as waiver by estoppel.

So far as the record discloses in this case defendant required no further proof of loss, production of papers, arbitration, or other proceedings under the policy which might operate to delay, after the examination of Dahrooge under oath in January, 1911. From that time plaintiffs were legally at liberty to begin an action whenever they saw fit. They had, however, been advised that the matter was in the hands of Mr. Bartells, the adjuster, and were negotiating with him for a settlement. Though the details are not given, it seems evident that there was some matter in difference between them, for Dahrooge testifies: That the next time he saw Bartells after the examination under oath, in January, was in February, and he then talked of a compromise; "said we would get together soon, that he was busy just at that time." That he thought he saw him again in March or April, when Dahrooge with his attorney met Bartells on the street, and they walked and talked together. That he then said:

"We will get together, Mr. Dahrooge; I am busy now, and I will be back in a few days."

That in reply to the statement that they would wait no longer, but would sue, he said:

"Don't sue, we will get together and settle it up."

That he again saw Bartells in June or July, and said:

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"You are delaying so long; I am going to sue you" —to which Bartells replied: "I will tell you, Mr. Dahrooge, my friend is sick in Detroit, and I cannot bother; you better go in and see the attorneys, Mr. McPherson and Mr. Norris, and they will fix you up. * * *

"*Q.* What, if anything, did he say about whether it was necessary to sue the company or not?

"*A.* He did not say; he said: 'You go over there and they will fix you up, Mr. Dahrooge.' He said: 'Don't sue; I am busy, and I will be back again. You go and see Mr. Norris; he has it now, and I think he will fix it up with you.' That was some time in July, but I cannot remember the exact date in July."

Witness further testified that he later, in July, visited one of the attorneys to whom Bartells referred him, and told him he was going to sue the company if they did not settle; that the attorney asked what kind of a proposition witness wanted to make to the company, to which he replied, "The full amount;" that the attorney offered him "something," which was not accepted; that in reply to the threat to start suit the attorney said, "That is up to you if you want to wait until Bartells comes back," and witness then said, "I waited long enough. * * * I ain't going to wait," after which he started suit. Plaintiffs' testimony on that subject, taken as a whole, can be said to show that up to this time they delayed action through hope and expectation of a settlement, encouraged by assurances of defendant's adjuster, but who, at the last interview with him, when approached with a demand for settlement, said he could not bother, and referred them to the defendant's attorneys; that an interview with one of said attorneys resulted in an offer of "something," which was refused, with the declaration that suit would be brought. That was some time in July. The year did not expire until the following October. The first suit was brought in August; a second was started before the year had expired, and this suit was begun 16

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months after the fire. The first and second failed, when or why is not disclosed in the record, beyond the statement of counsel for defendant in open court that service in the second was defective, and "that suit was quashed" and this third action was begun January 27, 1912.

Irrespective of the question of whether the adjuster of defendant could orally waive the statute of limitations provided in a standard policy, or by estoppel *in pais* bar defendant from pleading and relying on such statute, we are unable to find that the negotiations with the adjuster and attorney, taking any assurances or promises testified to have been made by them in their strongest light, amount, under the undisputed facts in this case, to a waiver or estoppel. No promises or assurances in writing were ever made by defendant. To plaintiffs' urgent demands, made through their attorneys, they were informed that the matter was in the hands of the adjuster. Negotiations with him began with a demand of payment and a proposal from him to "compromise," and ended by referring plaintiffs to attorneys, one of whom made an offer which was refused. Then all negotiations ended, over two months before the 12-month limitation had expired. During all this time plaintiffs had legal counsel and cannot plead ignorance of their rights. It has been frequently held that mere negotiations for an adjustment are not a waiver of limitations, especially where they do not cause delay beyond the period in which action may be brought. *McFarland & Steele* v. *Insurance Co.*, 6 W. Va. 425; *Vincent* v. *Life Ass'n*, 74 Conn. 684 (51 Atl. 1066); *Carlson* v. *Insurance Co.*, 172 Mass. 142 (51 N. E. 525); *Allen* v. *Insurance Co.*, 95 App. Div. (N. Y.), 86 (88 N. Y. Supp. 530); *Morrill & Co.* v. *Insurance Co.*, 71 Vt. 281 (44 Atl. 358); *Blanks* v. *Insurance Co.*, 36 La. Ann. 599.

In the last-mentioned case the policy contained a

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stipulation limiting the time in which claims could be prosecuted to one year following the loss. Negotiations were had in which promises to make payment on certain conditions were claimed to have been made. It was claimed that these conditions were fulfilled, after which defendants neglected or refused to pay. Several months were consumed in these negotiations. The court said:

"But here, even conceding that the negotiations were entitled to any effect whatever, they ceased, as conclusively proved, about two months before the expiration of the limitation. The mere pendency of the negotiations between the parties on subject of settlement will not of themselves operate as a waiver of the limitation, unless they are of a character to induce the insured to abstain from suit within the time."

Though it may be conceded that some of our decisions appear to view this question from a somewhat different angle, we think that the above rule of law is borne out by reason and abundant authority, and is in harmony with the principles laid down in *Shackett* v. *Benefit Society*, 107 Mich. 65 (64 N. W. 875); *Law* v. *Accident Ass'n*, *supra*, and *Lentz* v. *Insurance Co.*, *supra*.

It has been suggested in consultation that section 9738, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 14145), may have some application here. The section provides, in cases where an action has been begun within the time limited in the same chapter and failed for specified reasons, that the time for commencing an action is extended for one year from abatement of the original suit. The saving provisions of that section relate to the limitations specified in the chapter of which the sections form a part, and have no application to cases barred under Act No. 277, Pub. Acts 1905 (3 How. Stat. [2d Ed.] § 8328). *Wilton* v. *City of Detroit*, 138 Mich. 67 (100 N. W. 1020). It is to be inferred that such was the view of counsel in this

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case. While the question of the statute of limitations, on the one side, and waiver, on the other side, are raised, urged, and exhaustively argued pro and con by counsel in their respective briefs, no reference is made to said section 9738, nor has there been any suggestion by counsel on either side that they consider it pertinent, or desire the court to pass upon it. This court has so often said that questions not raised by the record, and argued in the briefs, cannot be considered that to cite authority would be superfluous. Furthermore, if we were of opinion that it was a proposition material to a decision here, the case could not be decided upon such point until both counsel have been notified and given an opportunity to argue the same before this court. Section 193, 1 Comp. Laws (4 How. Stat. [2d Ed.] § 11690).

Since the foregoing opinion was written counsel of record were invited to furnish briefs, if they so desired, relative to the applicability of the statute last referred to. Carefully prepared briefs from both sides have recently been received. We are still of the opinion that the bill of exceptions upon which the case was heard does not properly present that question, and also that said section 9738, which was enacted prior to 1857, does not apply to this special statute of limitations relative to fire insurance policies, enacted in 1905.

For the foregoing reasons we are constrained to hold that the conclusions reached by the trial court are well founded, and its judgment is affirmed.

MOORE, MCALVAY, BROOKE, KUHN, STONE, and OSTRANDER, JJ., concurred with STEERE, C. J.

BIRD, J. *(dissenting)*. I am unable to agree with the conclusion of Mr. Justice STEERE that this case should be affirmed. I think it is saved from forfeiture by the statute. The first suit on this cause of action was begun on August 25, 1911. For some

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reason which is not disclosed, it was dismissed. The second suit was begun within the year limited in the policy, and was subsequently and after the year had expired dismissed on account of defective service of process. The present suit was begun January 27, 1912, within one year after the second suit had failed for want of proper service. This state of facts brings the case, in my opinion, within the saving statute, section 9738, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 14135), which reads as follows:

"If, in any action, duly commenced within the time limited in this chapter, and allowed therefor, the writ or declaration shall fail of a sufficient service or return, by any unavoidable accident, or by any default or neglect of the officer to whom it is committed * * * the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after the reversal of the judgment therein."

Section 9728 of the chapter to which the foregoing section refers, provides that "all actions of assumpsit, or upon the case, founded upon any contract or liability, express or implied," shall be commenced within six years after the cause of action shall accrue, and not afterwards. Had not the standard policy been enacted by Act No. 277 of the Public Acts of 1905, the plaintiffs would now clearly have the right to commence their action any time within six years from the date when the policy was payable. The act amended, by implication, section 9728, and reduced the time in which suit might be commenced on standard fire insurance policies from six years to one year. The foregoing statute should now be read in connection with Act No. 277, and construed together as one law. 36 Cyc. p. 1164; *Conrad* v. *Nall*, 24 Mich. 275; *People, ex rel. Attorney General*, v. *Railroad Co.*, 145 Mich. 140 (108 N. W. 772); *Dennison* v. *Allen*, 106 Mich. 295 (64 N. W. 38). If we follow this rule of

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construction and read section 9728 in connection with the amendment, that section would then read:

"All actions of assumpsit, or upon the case, founded upon any contract or liability, express or implied, shall be commenced within six years after the cause of action shall accrue, and not afterwards, *provided that all actions upon the standard fire insurance policy shall be commenced within twelve months next after the fire.*"

While Act No. 277 of the Public Acts of 1905 clearly indicates an intention to shorten the period within which actions on the standard policy may be commenced, it nowhere indicates an intention to withdraw such actions from the protection of the saving statute. The case of *Wilton* v. *City of Detroit*, cited, does not apply because that case dealt with a local law, while Act No. 277, Pub. Acts 1905, involved in this case, is a general law.

The suit having been commenced within the year of grace allowed by the statute, I am of the opinion that it is thereby saved from forfeiture, and that the judgment should be reversed and a new trial granted.

PEOPLE, *ex rel.* ATTORNEY GENERAL, *v.* QUINCY MINING CO.

CORPORATIONS — TAXATION — INHERITANCE TAX — TRANSFER OF STOCK—ASSESSMENT OF STOCKHOLDERS.

Under the inheritance tax law, a corporation is not liable to the State for the tax upon its stock that was transferred by the will of a decedent who resided in Massachusetts, where the defendant made the transfer on its books without retaining sufficient to pay the tax or noti-

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fying the county treasurer; Act No. 188, Pub. Acts 1899, as amended by Act No. 195, Pub. Acts 1903 (1 How. Stat. [2d Ed.] §§ 2022, 2030). It could not be said that the defendant had control over or held the stock within the meaning of the statute, since it enumerates the persons liable to pay the tax, and does not include such corporation; and its stock being absolutely owned by the holder who may dispose of his shares as he sees fit.[1]

Error to Wayne; Hosmer, J. Submitted January 29, 1913. (Docket No. 49.) Decided November 3, 1913.

Assumpsit by the People of the State of Michigan on relation of Roger I. Wykes, attorney general, against the Quincy Mining Company for certain taxes. Judgment for plaintiff. Defendant brings error. Reversed.

Otto Kirchner, for appellant.

Roger I. Wykes, Attorney General, and *L. D. Averill*, Assistant Attorney General, for the people.

STONE, J. In this case the question is as to the liability, under our inheritance tax law, of a domestic corporation which has transferred upon its books the stock of a nonresident decedent, and issued a new certificate therefor, before payment of the inheritance tax, and without giving notice, either of such transfer or the issuing of such new certificate, to the proper county treasurer. The question is raised by demurrer to the declaration, by which it appears that one John Blackie, domiciled, at the time of his death, at Brookline, in the State of Massachusetts, was the owner in his own right of 25 shares of the capital stock of the defendant, a Michigan corporation, formed and existing under the Michigan statute that

[1] As to inheritance tax on stock in a domestic corporation belonging to the estate of a nonresident, see notes in 19 L. R. A. (N. S.) 887 and 25 L. R. A. (N. S.) 384.

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provides for the formation of mining companies, being Act No. 113 of the Public Acts of 1877, and the acts amendatory thereof.

Decedent made a will that was duly probated by the surrogate court for Suffolk county, in the State of Massachusetts. Under that will thus probated, his executrix transferred said 25 shares of stock to a legatee named in the will. The legatee surrendered his stock certificate to the defendant company, which made a transfer of the stock upon its books, and issued to him, said legatee, in his own name, a certificate for said stock, without giving notice, either of such transfer upon its books, or of the issue of the new certificate to the legatee, to the proper county treasurer. The facts are fully set out in the declaration. Defendant demurred. The demurrer was overruled. Defendant elected to stand by its demurrer. Thereupon the court rendered a final judgment for the plaintiff, and against the defendant, for the amount of the tax. This being an amicable action, the court, agreeably to the stipulation of the parties, ordered that no costs be allowed the prevailing party. The defendant has brought the case here upon writ of error, and contends that it is not liable to pay said inheritance tax, because: (1) No such liability is imposed by the common law. (2) It is not imposed by statute.

The Michigan inheritance tax law was adopted in 1899, being Act No. 188, and was amended in every section but one by Act No. 195 of the Public Acts of 1903 (1 How. Stat. [2d Ed.] §§ 2022, 2030). This action is brought under section 14 of the act of 1903, which, among other things, provides:

"As a cumulative remedy for the collection of the tax, the State may proceed by an action of assumpsit in any court of competent jurisdiction."

It will be noted that by this provision no new lia-

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bility was imposed; but an additional or cumulative remedy was given.

It will be well for us to notice next the provisions of our statute; sections 3 and 5 of the act of 1903 enumerate the persons chargeable with the payment of this tax thus:

"SEC. 3. Every such tax shall be and remain a lien upon the property transferred until paid, and the person to whom the property is so transferred and the administrator, executor, and trustee of every estate so transferred, shall be personally liable for such tax until its payment. * * *"

"SEC. 5. * * * Any such administrator, executor, trustee or other person having in charge or in trust any legacy or property for distribution subject to such tax, shall deduct the tax therefrom; and within thirty days thereafter shall pay over the same to the county treasurer, as herein provided. * * * He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this act to any person until the tax assessed thereon has been paid to him or to the county treasurer."

Obviously, these two sections apply only to domestic executors, administrators, and trustees. Special provision is made by section 9 of the act of 1903 for the payment of the tax by foreign executors, administrators, and trustees, as follows:

"If a foreign executor, administrator or trustee shall assign or convey any stock or obligation in this State standing in the name of a decedent, or in trust for a decedent, liable to any such tax, the tax shall be paid to the treasurer of the proper county on the transfer thereof; *and any corporation, person or persons having control over any such assets, shall not deliver or transfer the same to any person or corporation other than an executor, administrator, trustee or guardian duly qualified under the laws of this State, until the tax to which the same is liable has been paid as provided in this act.* No safe deposit company, trust company, bank or other institution, person or persons holding securities or assets of a decedent shall deliver or transfer the same to the

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executors, administrators, or legal representatives of said decedent or their assignees unless notice of the time and place of such intended delivery or transfer be served upon the county treasurer by said company, bank, institution, person or persons, at least five days prior to the said delivery or transfer. And it shall be lawful for the said county treasurer and is hereby made his duty personally or by representative, to examine said securities or assets at the time of or prior to such delivery or transfer. Failure to serve such notice or to allow such examination on the delivery or transfer herein prohibited, shall render such safe deposit company, bank, or other institution, person or persons liable to the payment of the tax due or to become due upon said securities or assets in pursuance of the provisions of this act."

The part printed in italics was no part of the section as originally enacted; it was inserted by amendment in 1903.

1. It will not be necessary for us to discuss the question raised by appellant, that no liability is imposed upon the defendant at common law to pay this tax, because the entire contention of the attorney general is that the liability is one imposed by statute.

2. This brings us to the consideration of the main question in the case. The appellant does not question the right of the State to inhibit a corporation organized under its laws from registering a transfer of its stock upon its books under the pain of liability to pay the inheritance tax, if any is due thereon. The question is, Has the State done so? It is the claim of the appellant that neither the statute under which the defendant was organized nor its by-laws, nor both combined, give the corporation control of the stock of its stockholders. It is urged that the title to stock may be transferred by an assignment and delivery of the stock certificate, and that the transfer of such stock upon the books of the company is not necessary to effect such transfer of title, and the following cases are cited in support of this position:

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Mandelbaum v. *Mining Co.*, 4 Mich. 465; *Newberry* v. *Manufacturing Co.*, 17 Mich. 141; *McLean* v. *Medicine Co.*, 96 Mich. 479 (56 N. W. 68), and cases cited; *May* v. *Cleland*, 117 Mich. 45 (75 N. W. 129, 44 L. R. A. 163); *Rough* v. *Breitung*, 117 Mich. 48 (75 N. W. 147); *Foster* v. *Row*, 120 Mich. 1 (79 N. W. 696, 77 Am. St. Rep. 565); *Michigan Trust Co.* v. *Comstock*, 123 Mich. 689 (82 N. W. 527); *May* v. *McQuillan*, 129 Mich. 392 (89 N. W. 45); *Lufkin Rule Co.* v. *Secretary of State*, 163 Mich. 30 (127 N. W. 784).

The attorney general does not question the authorities above cited by appellant, but claims that there are intervening superior rights or equities of the State here which render them inapplicable. If there are any such superior rights or equities, it is conceded that the same are based upon or grow out of the very terms of the statutes that we are here considering. In other words, the right to maintain this action, if it exists, is because of the statutory liability of the defendant in this case. If no such statutory liability exists, then the State has no intervening superior rights or equities.

We are of the opinion that the provisions of section 9, above quoted, are not applicable to this defendant, because it is not a safe deposit company, trust company, bank, or other institution or person *holding securities or assets of the decedent, or controlling the same.* In no just sense can it be said that the defendant holds or controls the stock upon which the inheritance tax, sought to be imposed here, is chargeable.

We are of opinion that the defendant is not liable to pay this tax, because no such liability is imposed by the statute. It cannot be said that the defendant either "had control over" the stock in question, or "held" it. Stock in a corporation, absolutely owned by an individual, is his own property, which he may

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sell or dispose of as he sees fit, and the corporation has no "control over" it, nor does the corporation "hold" it, within the meaning of the statute. The statute enumerates the persons liable to pay the tax, and does not include the defendant. We think that this conclusion is in harmony with the history of the legislation imposing the so-called inheritance tax. We said in *Re Stanton's Estate*, 142 Mich. 491, 495 (105 N. W. 1122), in speaking of the statute imposing the tax:

"The statute is adopted, together with a judicial interpretation of the language above quoted, from the State of New York."

The New York legislation upon this subject has been as follows: By section 11 of chapter 483 of 1885, being the 108th session of the legislature of that State, it was provided:

"Whenever any foreign executor or administrator shall assign or transfer any stocks or loans in this State, standing in the name of a decedent, or in trust for a decedent, which shall be liable to the said tax, such tax shall be paid to the treasurer or comptroller of the proper county on the transfer thereof, otherwise the corporation permitting such transfer shall become liable to pay such tax, provided that such corporation has knowledge before such transfer that said stocks or loans are liable to said tax."

By this early New York statute, liability to pay the tax was thus, in express terms, imposed upon the corporation that made the transfer of the stock upon its books. But this law was again amended in 1892, as appears by section 9 of chapter 399 of the 115th session of the legislature of New York. That section reads as follows:

"If a foreign executor, administrator or trustee shall assign or transfer any stock or obligations in this State standing in the name of a decedent, or in trust for a decedent, liable to any such tax, the tax shall be paid to the treasurer of the proper county or

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the comptroller of the city of New York on the transfer thereof. No safe deposit company, bank or other institution, person or persons holding securities or assets of a decedent, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent unless notice of the time and place of such intended transfer be served upon the county treasurer or comptroller at least five days prior to the said transfer. And it shall be lawful for the said county treasurer or comptroller, personally or by representative, to examine said securities or assets at the time of such delivery or transfer. Failure to serve such notice or to allow such examination shall render said safe deposit company, trust company, bank or other institution, person or persons liable to the payment of the tax due upon said securities or assets in pursuance of the provisions of this act."

The provisions of the section of the Michigan inheritance tax law of 1903 are substantially the same as the last above-quoted statute of New York; but the legislature of New York, in 1902, again amended the law. See Laws of New York, 125th Session, vol. 1, p. 352. We quote that statute even at the risk of prolixity. It is as follows:

"SEC. 228. Liability of Certain Corporations to Tax. If a foreign executor, administrator or trustee shall assign or transfer any stock or obligations in this State standing in the name of a decedent, or in trust for a decedent, liable to any such tax, the tax shall be paid to the treasurer of the proper county or the State comptroller on the transfer thereof. No safe deposit company, trust company, corporation, bank or other institution, person or persons having in possession or under control securities, deposits or other assets of a decedent, *including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer herein provided,* shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent, or upon their order or request, unless

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notice of the time and place of such intended delivery or transfer be served upon the State comptroller at least ten days prior to said delivery or transfer; nor shall any such safe deposit company, trust company, corporation, bank or other institution, person or persons deliver or transfer any securities, deposits or other assets of the estate of a nonresident decedent including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution, making the delivery or transfer, without retaining a sufficient portion or amount thereof to pay any tax and penalty which may thereafter be assessed on account of the delivery or transfer of such securities, deposits or other assets *including the shares of the capital stock of or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer*, under the provisions of this article, unless the State comptroller consents thereto in writing. And it shall be lawful for the said State comptroller, personally, or by representative, to examine said securities, deposits, or assets at the time of such delivery or transfer. Failure to serve such notice and to allow such examination, and to retain a sufficient portion or amount to pay such tax and penalty as herein provided, shall render said safe deposit company, trust company, corporation, bank or other institution, person or persons liable to the payment of three times the amount of the tax and penalty due or thereafter to become due upon said securities, deposits or other assets, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution, making the delivery or transfer; and the payments as herein provided shall be enforced in an action brought in accordance with the provisions of section two hundred and thirty-five of this chapter."

It therefore appears that section 9 of the Michigan law was substantially the law of New York as passed in 1892. Were our statute like the section last above quoted, there would be no question as to the liability of the defendant, because that statute imposed upon a

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corporation, making a transfer of its own stock upon its books, a liability for the payment of the tax; but the legislature of this State has not seen fit to adopt the last legislation of New York in that behalf.

It therefore appears to us that the liability here sought to be enforced is purely statutory; that the statute enumerates the persons liable to pay the tax, and by implication excludes the defendant; that it does not own, hold, or control the stock upon which the inheritance tax is sought to be collected; that such stock was the absolute property of the testator, by virtue of whose will it was transferred to his legatee, and the transfer registered upon defendant's books; that defendant had no option, discretion, or control in the matter; that the defendant is not within the purview of the statute, and therefore that the judgment of the circuit court was erroneous, and will be reversed, and no new trial granted, but without costs.

STEERE, C. J., and MOORE, BROOKE, OSTRANDER, and BIRD, JJ., concurred. MCALVAY and KUHN, JJ., did not sit.

QUIGLEY v. WOLF.

MORTGAGES — FORECLOSURE — TRUSTS — INCONSISTENT POSITIONS — PUBLIC POLICY—INJUNCTION AGAINST FORECLOSURE.

In a suit to restrain defendant from foreclosing a mortgage by advertisement, upon the alleged ground that defendant, as trustee, had entered into a contract of guaranty that was void as against public policy, by reason of defendant's occupying illegal and inconsistent

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positions, *held*, that if any harm had been done by the alleged improper conduct of defendant, the court could not remedy the illegality of the transaction by declaring the mortgage invalid.

Appeal from Kent; Brown, J. Submitted April 14, 1913. (Docket No. 60.) Decided November 3, 1913.

Bill by John F. Quigley and wife against Gustave A. Wolf for an injunction to restrain the defendant from foreclosing a mortgage by advertisement. From a decree for defendant, complainants appeal. Affirmed.

Charles E. Ward, for complainants.

Gustave A. Wolf and *Myron H. Walker*, for defendant.

MOORE, J. On April 11, 1908, the complainants made a mortgage on certain real estate, running to the defendant. During the summer of 1911, the defendant commenced to foreclose said mortgage by newspaper advertisement. The bill of complaint in this case was filed July 6, 1911. It is a sworn bill of complaint. In it is averred that defendant was, on and before January 31, 1908, the legal adviser of complainants, and represented to them that it was important for them to acquire certain stock in the J. F. Quigley Lumber & Land Company, and that defendant undertook to procure said stock, if complainants would execute to David Wolf, a brother of the defendant, the mortgage hereinafter described.

The bill of complaint proceeds as follows:

"That in order to carry out said arrangement and comply with the said advice so given them by said defendant, they, at some time in the early part of the year 1908, the exact date of which they are unable to give, at the request and instance of said defendant, signed a mortgage for the sum of $3,000, cover-

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ing the land hereinbefore described, and executed a note for the said sum of $3,000, which note represented the said indebtedness which said mortgage was given to secure, and that the said mortgage, after being so executed, was left with the said defendant.

"That at the time said mortgage was made and so left with said defendant, the agreement and arrangement therefor was, by the said defendant, reduced to writing and signed by him, and said writing was delivered to your orators and the same is now in their possession ready to be produced and proved as this honorable court shall direct. The said writing truly and correctly recites the agreement then made between your orators and the said defendant in regard to said mortgage, and is in words and figures as follows:

"'GRAND RAPIDS, MICHIGAN, January 31, 1908.

"'Received of John F. Quigley and Flora E. Quigley, a certain note and mortgage bearing even date herewith, made by them to David Wolf on lots seven (7) and eight (8) of block (11) Oakdale Park addition to the city of Grand Rapids, to be held by me in escrow and delivered to said David Wolf by me on receipt by me of thirty (30) shares of preferred stock in the J. F. Quigley Lumber & Land Company, issued to C. R. Hills, represented by certificate No. 26; ten (10) shares of preferred stock in said J. F. Quigley Lumber & Land Company, issued to Elmer E. Dennis, represented by certificate No. 28; nine (9) shares of preferred stock in said J. F. Quigley Lumber & Land Co., issued to Alvin E. Dennis, represented by certificate No. 29; and one (1) share of preferred stock in said J. F. Quigley Lumber & Land Company, represented by certificate No. 22 issued to Horace L. Foote, all of said shares of stock to be indorsed in blank by the owner thereof and delivered by me to said Flora E. Quigley on the delivery of said mortgage to said David Wolf.

"'On failure by me to receive said stock within ninety days from the date hereof said mortgage is to be returned by me to said John F. Quigley and Flora E. Quigley or either of them.

"'G. A. WOLF.'

"That said defendant never procured the certificates of stock mentioned and described in the receipt so delivered by him to your orators. * * *

"That the said defendant, contrary to the rights of your orators, and without their consent, on, to wit,

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the 11th day of April, 1908, recorded said mortgage in the office of the register of deeds for the county of Kent; that by an examination of the record of said mortgage it appears to bear date April 11, 1908, and to run to the said defendant, but your orators show that the said mortgage is the same and none other than the one described in said receipt so executed and delivered to your orators by the said defendant. * * *

"That notwithstanding the agreement and arrangement hereinbefore set forth between your orators and said defendant, and contrary to the rights and equities of your orators, the said defendant has advertised and given out that default has been made in the conditions of said mortgage; that on March 30, 1911, there was due from your orators to him upon said mortgage the sum of $3,574, and has caused to be published in the Grand Rapids Chronicle, a newspaper published at Grand Rapids, Mich., and circulating in the county of Kent and elsewhere, a notice of mortgage foreclosure sale. * * *"

The prayer of the bill of complaint is:

"*(a)* That a temporary injunction be issued out of this honorable court, restraining the said defendant from selling or attempting to sell the land mentioned in this bill of complaint at the time stated in said notice of sale, or at any other time.

"*(b)* That at the final hearing of this cause said injunction be made permanent.

"*(c)* That the said defendant may be required, by the decree of this court, to discharge said mortgage of record and deliver the same, together with said note, to your orators.

"*(d)* That your orators have such other and further relief in the premises as shall be agreeable to equity and good conscience.

"*(e)* That appropriate process issue herein.

"JOHN F. QUIGLEY,
"FLORA E. QUIGLEY,
"Complainants."

The defendant filed an answer in the nature of a cross-bill, in which he avers that in the negotiation for the stock mentioned in the bill of complaint, the

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agreement to procure the same was made with David Wolf, and not defendant; that defendant was acting as the legal adviser of David Wolf, and not for the complainants; that the mortgage to which the paper dated January 31, 1908, set out in the bill of complaint, refers, was a mortgage for $1,500, running to David Wolf, and was not the mortgage defendant was foreclosing. We now quote from the answer and cross-bill:

"Defendant denies the allegations of paragraph 5 of said bill. The consideration for the $3,000 mortgage dated April 11, 1908, was the payment by defendant at complainants' request of the $1,500 note and mortgage of January 31, 1908, held by David Wolf, and the further advance and credit at their request by defendant to complainants of money and money's worth to the additional amount of $1,500. And that the $3,000 consideration for the mortgage of April 11, 1908, was derived from and charged up to trust funds in the hands of defendant not his own, as complainants well knew at the time.

"Defendant denies the allegations of paragraph 6 of said bill. The stock agreed to be procured was procured for them by David Wolf at the time of the execution of the $1,500 mortgage to him.

"Defendant denies the allegations of paragraph 7 of said bill. That complainants well knew that the mortgages of January 31, 1908, and of April 11, 1908, represent different transactions, and that the latter mortgage represents the full consideration of $3,000 to the parties thereto. * * *

"And this defendant, further answering and claiming the benefit of a cross-bill, says: That on or about April 11, 1908, said John F. Quigley and Flora E. Quigley did make and execute under their hands and deliver to defendant their one certain promissory note dated the 11th day of April, 1908, and thereby, for value received as hereinbefore set forth, promised to pay to him the sum of $3,000 on or before five years after date thereof with interest at 7 per cent., payable semi-annually. * * *

"That said mortgage contains a covenant and agreement that, should default be made in the pay-

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ment of the interest, or any part thereof, when payable, and should the same remain unpaid for 30 days, then the principal sum with all arrearages of interest should, at the option of the mortgagee, become payable immediately, although the period limited for payment thereof should not then have expired.

"That the execution of said mortgage was, on April 11, 1908, duly acknowledged by the said John F. and Flora E. Quigley before a notary public duly authorized to take such acknowledgment; the certificate of such acknowledgment being duly indorsed on said mortgage. * * *

"Defendant further shows that, as he believes and charges, this bill herein is not filed by complainants in good faith, but is without merit, and without any legal or equitable basis therefor in fact, as they well know. That the injunction herein was sued out recklessly, and with the malicious intent to cause defendant unnecessary delay and expense in the collection of said $3,000 mortgage, and to injure him personally. That defendant has been promised time and again payment of the interest, and also has been promised payment of the principal, of said $3,000 mortgage. That no question whatever has ever been raised about the validity of the mortgage to the full amount until defendant gave notice of his intent to foreclose, and then the present defense stated in the bill was, as defendant verily believes and charges, trumped up."

The prayer is for affirmative relief.

The case was put at issue and tried in open court at such length that the printed record contains nearly 500 pages. The trial judge made a decree, in which appears the following:

"(1) That the $3,000 note and mortgage mentioned in the original bill, which are dated April 11, 1908, running to the defendant, G. A. Wolf, were given in consideration of the payment by the defendant, G. A. Wolf, of $3,000 in money and money's worth to and for the use and benefit of the complainants as hereinafter stated, and were not given for the consideration and upon the conditions alleged in said bill.

"(2) That the receipt and agreement signed by

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the defendant, G. A. Wolf, set forth in paragraph 5 of said original bill, refers to a prior mortgage of $1,500, dated January 31, 1908, running to David Wolf, and does not refer in any manner to the $3,000 note and mortgage.

"The said agreement was superseded by other agreements subsequently executed between the parties, being Exhibits Nos. 18 and 22, inclusive, of all of which complainants had full knowledge.

"Said $1,500 mortgage to said David Wolf was recorded on April 3, 1908, at which date, at the latest, it became and was an absolute and unconditional obligation from said complainants to said David Wolf.

"(3) That on April 11, 1908, the defendant, G. A. Wolf, at the request of complainants, took up and paid to said David Wolf said $1,500 note and mortgage, and said David Wolf discharged the sums of record on the same date; and the said G. A. Wolf, at the complainants' request and on the same date, also took up and paid another note and mortgage given by the complainants on lot 22, Nagele's addition, on which there was due $467, and at the same time gave them money and credit for the balance of $3,000, a full statement of the amount of which said $3,000 mortgage and the consideration is as follows:

David Wolf note and mortgage paid by defendant at complainants' request.....		$1,500 00
Interest, etc.		20 00
Quigley mortgage on lot 22, Nagele's addition, paid by defendant at complainants' request		467 00
Certificate of deposit	$650 00	
Certificate of deposit	153 37	
Delivered to complainants by defendant.....		803 37
Credit as agreed on account of complainants, owing to defendant		137 22
Check of G. A. Wolf to complainant J. F. Quigley for balance		73 45
		$3,001 04

"The money for the above amounts, aggregating $3,000, for which said mortgage was given, was a loan to complainants from trust funds held by G. A. Wolf, as trustee, for and belonging to the estate of

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his mother, who was deceased, and the income of which belonged to his father, and who is still living, of which the complainants had notice and knowledge; and the same was at the time charged by defendant in his account with said trust as a loan to complainants.

"That the securities were marked by defendant as belonging to his mother's estate, and were kept by him in a separate drawer in his safe, used only for the securities of her estate, and defendant kept an account on his books with his mother's estate in which this transaction appears, and he made an annual report to his father, showing the securities belonging to the estate and the income therefrom, which report included this $3,000 mortgage and accrued interest.

"(5) That the defendant practiced no deception upon complainants, and that they were fully cognizant of the facts in connection with said $3,000 mortgage and the consideration thereof, and voluntarily executed the same to secure the moneys advanced and used for their benefit as above stated."

Then followed the usual decree of foreclosure. The complainants bring the case here by appeal.

The record shows that in making certain statements in this sworn bill of complaint the complainant John F. Quigley is certainly very reckless. His own proofs show beyond any question that the paper set out in his bill of complaint did not refer, as he states, to the $3,000 mortgage which was in process of foreclosure, but did refer to a $1,500 mortgage, which at the time the $3,000 mortgage was given was discharged of record, and was delivered to Mr. Quigley and produced by him upon the trial. It is said in his behalf that he was ill when the transactions referred to in his complaint occurred, and that he had forgotten what happened. The situation disclosed by the record hardly justifies this claim, and certainly if before filing this bill of complaint the records in the office of the register of deeds had been examined, they would have shown the falsity of the aver-

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ments. There did, however, arise upon the trial of the case grave questions growing out of certain documentary evidence in the case, to some of which documents reference is made in the decree rendered in the court below.

It is claimed on the part of defendant that David Wolf procured 20 shares of stock under the agreement made in January, 1908, but that it was found in February that he could not get the balance of it because of litigation which had arisen between one Hills and the Dennis brothers, who were the holders of the stock, and that to take care of any possible trouble arising out of the failure to procure the balance of the stock other papers, reading as follows, were executed, dated as of the same date as the prior paper, and that they were to stand in the place of it.

"GRAND RAPIDS, MICH., Jan. 31, 1908.

"Received of John F. and Flora E. Quigley one note and mortgage for $1,500, being payment in full for the 20 shares of preferred stock of the John F. Quigley Lumber & Land Co., issued to Dennis Bros. and Foote.

"And we also guarantee that Flora E. Quigley shall recover a decree in her chancery suit against said company and G. A. Wolf, Trustee, for the discharge of the two mortgages held by said trustee; and we also guarantee that if liability is established and collection made on account of the 30 shares of preferred stock in said company issued to C. R. Hills, either against said company or John F. and Flora E. Quigley, that we will save them harmless from such payment up to the amount of $1,000.

"And if David Wolf is not held liable on account of any other indemnity he has signed on account of said Hills stock, then we will save said parties harmless from such payment up to the amount of $1,500.

"DAVID WOLF,
"G. A. WOLF."

"GRAND RAPIDS, MICH., Jan. 31, 1908.

"I hereby agree in consideration of the contract this day made with David and G. A. Wolf that if any

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liability arises thereunder against them in excess of fifteen hundred dollars, that I will make the same good to them to an amount not exceeding five hundred dollars, additional.

"JOHN F. QUIGLEY."

Counsel for complainant argue with great earnestness that these papers disclose a situation that should not only avoid the $1,500 mortgage, but the $3,000 mortgage as well. This claim is based upon the fact that when the guaranty agreement, so called, was made, Mr. G. A. Wolf, as trustee, was a party to the suit mentioned therein, and that the agreement was void because against public policy. It is the claim of defendant that the agreement was not illegal because he did not represent the stockholders in the litigation; that his answer disclosed that he was a mere stakeholder; that the stockholders were represented by the receiver, who had put in an answer, and was represented by a solicitor, and that defendant was a mere stakeholder, and his conduct would in no way influence the decree that would be rendered. He claims, further, that as trustee he had no interest in the litigation because the trust had been completed. We quote from his brief:

"We desire to emphasize the fact that defendant was not in law or fact any longer a trustee at the time the agreements in question were made in February, 1908, but was in the position of a mere stakeholder. His appointment was for a special purpose only, to secure certain indorsers or guarantors. The trust instrument states the specific purpose:

"'To secure the following directors * * * for their indorsement or guaranty of a certain note * * * which may be made within one year.'

"And this agreement provided that when the notes were paid, the securities 'shall be reassigned by said trustee to said company.' When defendant on June 25, 1907, paid the bank the $2,350, the balance due it, and thereby completely executed the purpose of the

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trust, he became a mere stakeholder for Mr. Miller, the receiver, who was the company's sole legal representative. As Judge Hatch testified:

"'I certainly understood that the order by which Fred C. Miller was appointed receiver carried with it the right to all of the assets of the company. * * * As a matter of fact I knew that an assignment of those mortgages had been made to the trustee prior to the appointment of the receiver. I suppose whatever equity or rights the company had in the reassignment of those mortgages back to the company was conveyed to Mr. Miller by the order appointing him receiver.'

"In addition to the authorities we have cited, showing that on the performance of the defendant's trust the title to the securities at once passed by operation of law, we cite further: *Selden* v. *Vermilya*, 3 N. Y. 525, where it is held:

"'A trust to sell real estate for the payment of debts ceases when the debts are in any mode paid or discharged.'

"And in *Salomon* v. *Sternfeld* [102 N. Y. 665], 7 N. E. 47, it is held:

"'The purpose for which a trust was created having ceased, the trust itself ceases, and the property reverts to the creator of the trust.'

"In *Brillhart* v. *Mish*, 99 Md. 447 [58 Atl. 28], it is held:

"'The legal estate of a trustee under a voluntary deed of trust does not last longer than is necessary to effect the objects of the trust, and when these objects have been accomplished the trust is at an end.'

In 1 Perry on Trusts, § 312, it is said:

"'Although a legal estate may be limited to a trustee to the fullest extent, as to him and his heirs, yet it shall not be carried farther than the execution of the trust necessarily requires.'

"And in *Doe* v. *Considine*, 6 Wall. [U. S.] 458, it is stated:

"'It is equally well settled that where no intention to the contrary appears, the language used in creating the estate will be limited and restrained to the purposes of its creation.

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And when they are satisfied, the estate of the trustee ceases to exist, and his title becomes extinct. The extent and duration of the estate are measured by the objects of its creation.'

"It is clear that the receiver was the only person who could claim title to the mortgages if they belonged to the company, and at this time he was asserting this claim by his answer and cross-bill in Mrs. Quigley's suit. It is an elementary principle that the receiver of an insolvent corporation represents the stockholders as well as the creditors. The syllabus in *Franklin Nat. Bank* v. *Whitehead*, 149 Ind. 562 [49 N. E. 592, 39 L. R. A. 725, 63 Am. St. Rep. 302], states:

"'A receiver of an insolvent corporation represents the creditors as well as the stockholders, and holds the property for the benefit of both, and, as trustee for creditors, can maintain and defend actions which the corporation could not.'

"And in *Hays* v. *Pierson* [N. J.], 58 Atl. 728, it is held:

"'While a receiver of a corporation is the representative of creditors, he is also the representative of the corporation and of its stockholders, and may inquire into actions of the directors to the same extent that stockholders might do.'

"See, also, *First Nat. Bank* v. *Iron Works*, 60 Mich. 487, 499 [27 N. W. 657]. It is evident, from the trust agreement with defendant and the circumstances surrounding it, that it was intended solely for the benefit of the indorsers thereby secured. The defendant, therefore, as trustee did not represent stockholders; and clearly after the trust was executed he owed them no duty, and he could not then act for them. The title to the trust securities had immediately passed to the legal owners thereof. Still no act was committed, or even dreamed of, tending to a breach of trust. Defendant merely stood indifferent between the claimants awaiting the determination of the court. And as shown, his trust was ended, and his signing the agreement in question could not be, and was not, a breach of trust."

A reading of the record satisfies us that all the parties in interest supposed they had a right to do just what was done, and that it was to the advantage

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of the complainants in the present proceeding to have it done. Under the facts disclosed by the record we do not need to decide this feature of the controversy. Mr. David Wolf is not made a party to this proceeding. A decree later was entered in the case then pending as had been guaranteed. It still stands. After it was entered at the request of Mr. Quigley, Gustave A. Wolf paid David Wolf the $1,500 mortgage. It was paid out of funds in the hands of Mr. Wolf belonging to the estate of his mother, the income of which belonged to his father, and those facts were known to Mr. Quigley. An accounting was also had between Mr. Gustave A. Wolf and the Quigleys, and the state of the account was agreed upon, and with full knowledge of the situation the $3,000 mortgage was given. In this connection language used by Judge Severens, in *Buchanan* v. *Drovers' Nat. Bank*, 55 Fed. 223, 5 C. C. A. 83, is pertinent:

"It is very doubtful whether, assuming that the business was *malum prohibitum*, the mere knowledge that the proceeds of the note were intended to be used therein would render the note discounted void, if the bank did not co-operate in the use of the money. *Sortwell* v. *Hughes*, 1 Curt. 244 [Fed. Cas. No. 13,177]; *Webster* v. *Munger*, 8 Gray [Mass.], 587. But here the business connected with the giving of the first note and the use of the money realized thereon had transpired. The giving of the new note to raise money to pay off the earlier one did not promote the illegal business, assuming it to have been such, but was a transaction quite distinct from it. The new note, therefore, was not void by reason of any illegality in the first note. *Armstrong* v. *Toler*, 11 Wheat. [U. S.] 258; *McBlair* v. *Gibbes*, 17 How. [U. S.] 236; *Brooks* v. *Martin*, 2 Wall. [U. S.] 70; *Planters' Bank* v. *Union Bank*, 16 Wall. [U. S.] 483.

"In *Brooks* v. *Martin* the parties had been engaged as partners in buying and dealing in bounty land warrants, in violation of a statute prohibiting such dealings, the policy of which was to prevent soldiers to whom the warrants were issued from becoming

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the victims of speculators. The defendant, who had become possessed of a large sum of money in the prosecution of the forbidden business, resisted the action of his partner for an accounting on the ground of illegality in the cause of action; but the court refused to sustain the defense, and held that as the illegal object had been already accomplished, and the recovery of his share by the plaintiff would not aid in accomplishing any object in violation of law, the defendant should be compelled to account to the plaintiff.

"In *Planters' Bank* v. *Union Bank* the defendant had sold Confederate bonds, which had been sent to it by the plaintiff for that purpose, and in accounts rendered had charged itself with the proceeds. In a suit brought to recover therefor the defendant set up the illegality of selling the bonds as a defense. The court held that the defense did not avail; that while it would have been a good defense to a purchaser of the bond in a suit for the price thereof, or perhaps to the defendants in a suit by the plaintiff to recover damages for a failure to sell as directed, yet that whatever mischief there was in the transaction had already been done, and there was nothing in public policy to be affected by the action of the court in granting or withholding redress on other grounds."

See, also, *Portsmouth Brewing Co.* v. *Mudge*, 68 N. H. 462 (44 Atl. 600); *Boggess* v. *Lilly*, 18 Tex. 200.

We have not overlooked the item of $450 upon which counsel place much stress, though it is not mentioned in the bill of complaint. We accept defendant's version of this item, and hold it was intelligently passed upon by the parties when the mortgage was given.

The decree is affirmed, with costs.

BROOKE, KUHN, STONE, and BIRD, JJ., concurred with MOORE, J. STEERE, C. J., and MCALVAY and OSTRANDER, JJ., concurred in the result.

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WISNIEWSKI v. DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY CO.

RAILROADS—NEGLIGENCE—CROSSING ACCIDENT.

Evidence tending to show that decedent was crushed between two sections of a freight train which defendant's employees were coupling together on a street crossing in the night, that there was an open space between the standing and moving cars, through which decedent attempted to pass, and no lights were displayed at the end of the moving cars, that no trainmen were stationed at the crossing, and signals were not sounded, *held*, to raise an issue of fact for the jury upon the contributory negligence of deceased, since there were no eyewitnesses of the killing and decedent is presumed to have exercised ordinary care. MCALVAY and BROOKE, JJ., dissenting.[1]

Error to Wayne; Van Zile, J. Submitted June 4, 1913. (Docket No. 28.) Decided November 3, 1913.

Case by Frances Wisniewski, administratrix of the estate of Ignatz Wisniewski, against the Detroit, Grand Haven & Milwaukee Railway Company for the negligent killing of plaintiff's decedent. Judgment for defendant upon a directed verdict. Plaintiff brings error. Reversed.

Dohany & Dohany, for appellant.

Geer & Williams, for appellee.

Plaintiff, as administratrix, sues defendant for damages arising out of the alleged negligent killing

[1] On the question of contributory negligence in attempting to cross in front of engine or cars standing near street crossing, see note in 11 L. R. A. (N. S.) 963. And as to contributory negligence in attempting to cross a train standing on a crossing, see notes in 13 L. R. A. (N. S.) 1066 and 34 L. R. A. (N. S.) 466.

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of her intestate. Plaintiff's intestate, on the night of his death, had attended a "smoker" given by the lodge of which he was a member. The lodge room was located on Riopelle street between Willis and Canfield avenues. He resided on Dubois street between Garfield and Forest avenues. He was killed on defendant's tracks where they cross Warren avenue on Dequindre street. This point is two blocks west and two blocks north of his home.

The lodge room is located four blocks west and two blocks south of his home. He left the lodge room about 1 o'clock a. m. and his body was found beneath a freight car at 1:55 a. m. His feet were towards the east, the trunk of the body towards the west. His head, which had been severed from his body, was lying just west of the westerly rail of the track upon which he was killed. What he did or where he went after leaving the lodge room is unknown. As no witness saw the accident, it does not appear from which direction decedent approached the crossing. Between Hancock avenue on the south and Frederick street on the north, defendant maintains what is known as the "Farnsworth yard."

Crossing Warren avenue, there are ten tracks. Counting from west to east, Wilson's siding is the sixth track. It was upon this track that decedent met his death. The record discloses that it is customary for defendant to conduct switching operations in and about this yard during each night; there being many manufacturing institutions in the vicinity. The movements of the switching crew, as detailed by defendant's witnesses, just prior to the happening of the accident, were as follows: The switch engine moved north from Hancock, on the Wilson siding, and there coupled to a "drag" of 15 or 20 cars. It then moved south and "kicked" some cars from the north end of the "drag" into a track east of Wilson's siding. It then went south again and "kicked" seven cars

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north into Wilson's siding. Upon this operation defendant's witness, Squires, carrying a white light, rode upon the northerly car as they drifted north. According to his testimony, these seven cars stopped directly across Warren avenue; two or three of them being south of the south crosswalk. The engine then went south and "kicked" two or three more cars into an easterly track and then, with two or three cars attached, moved north on Wilson's siding to couple onto the seven cars standing across Warren avenue. Squires had walked along the west side of these seven cars and was at the south end awaiting the approaching engine to make the coupling. After the impact, the cars were pushed north about a car length, when Squires' attention was attracted by some one shouting at Warren avenue that a man had been killed. The train was stopped and an examination discovered decedent's body lying, as described, a few feet north of the southerly sidewalk on Warren avenue. The evidence conclusively established the fact that the switching engine, in the course of these operations, was equipped with an automatic bell which was ringing all the time.

It is likewise established that a pedestrian, when approaching Wilson's siding from the west, would have an unobstructed view to the south, beyond Hancock avenue, when 40 feet distant, and if approaching from the east a like unobstructed view at a much greater distance from Wilson's siding. An electric light hangs in the middle of Warren avenue, 60 feet west of Wilson's siding.

It was the theory of the plaintiff that decedent had approached the crossing from the west; that defendant, in placing the seven cars across Warren avenue, had cut them, leaving an open space at the south sidewalk; that decedent noticed this opening and attempted to pass through, when the cars to the south were pushed against him, throwing him to the ground

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and running over him. The only evidence in the record tending to support this theory is that of plaintiff's witness Monarch, who testified in part as follows:

"*A.* As I walked along Dequindre street I passed and I was between the fire tower and the engine room and I heard a noise and when I heard that voice I looked around and I heard a crash of cars and when I got to the— The crash came right after I heard some one holler. * * *

"*Q.* Now was there any light on the cars that was standing still, or on the end of the car that crashed into the cars that were standing still?

"*A.* No, sir; there was not.

"*Q.* Were there any trainmen where these two cars came together at the time they came together?

"*A.* No, sir; there was not."

The learned circuit judge assumed this testimony to be true but directed a verdict for defendant upon the ground that plaintiff's decedent was guilty of contributory negligence as a matter of law. He said in part:

"Suppose we accept as true, for the sake of argument, and the defendant disputes it by several witnesses, but suppose we accept it as true, and we would have to accept it as true at this stage of the case; that is, the witness Mark testified an opening was left between the cars as they stood there on Warren avenue so that persons could pass through who desired to cross at the point, and the deceased, according to the theory of plaintiff's counsel, undertook to pass through and was struck by the car or cars of the defendant, set in motion by the defendant's servants. Now, conceding that to be true, and suppose we go further and concede that there was negligence on the part of the defendant even in handling those cars, and that the negligence of the defendant resulted in the accident. Now, while I don't believe the proofs warrant this finding, but I am supposing this to be so for the sake of this illustration and for the sake of the case, then can it be said that the second requirement is made out, namely, that the negligence of the

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deceased did not contribute to this accident? It is claimed by counsel for the plaintiff that this, under the circumstances of this case, must be presumed, that he was not negligent, because he was killed and no one saw him killed, and that the presumption is that he was exercising that diligence that an ordinarily prudent man would exercise in protecting himself, and that is a presumption of the law where there is no testimony upon that subject on account of the death of the person who was injured; it is presumed that the man would exercise that reasonable care and prudence which would be exercised by a reasonably prudent man in taking care of himself. But this is a presumption of the law, and we are to presume for example, carrying that farther, we are to presume for example, that he exercised the care and the prudence of an ordinarily cautious person, that he looked, and that he listened for the approach of cars or trains, and that he did all that an ordinarily prudent man would do to protect himself. Now that is a presumption; but a presumption may always be overthrown by proof and so, if there is proof in this case that would or should overcome such a presumption, the plaintiff cannot have the benefit of it. In this case no one saw the deceased as he stepped between the cars; no one saw him meet his death. But the situation of the tracks is undisputed and what he must have discovered if he had looked and listened and been ordinarily cautious as he was bound to be. The car that struck him, according to the theory of the plaintiff, was on Wilson's siding. To go to the place where it was and where he was struck, he would have to walk on defendant's tracks some 40 feet; he would have to cross the Allison siding and the two main tracks before he would arrive at the Wilson siding, a distance of something like 40 feet; and while traversing this distance, according to the proofs, he had a clear vision down the track for a long distance, a distance at least as far beyond where the defendant's engine and cars were at work and where these cars and this engine were approaching on the Wilson siding. The bell on the engine was ringing. An arc light and electric light was burning 60 feet from the cars on the Wilson siding, or about that distance, on the side of the track on which

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he approached. So that it may be said here as an undisputed fact, I take it, that he could have seen (that an ordinarily prudent and cautious man could have seen), and that he must have heard the engine and the cars approaching. Now, it is a dangerous situation; the tracks themselves are to be considered, when one is crossing them, as being a place of danger when cars are running over them. It was a dangerous situation and a reasonably cautious man must be held to have understood it to be so. With such like surroundings, it cannot be presumed that the deceased was acting with caution; that is, with the caution that an ordinarily prudent man would act, being in a position where he could have seen and should have seen, where he could have heard and should hear, being upon these tracks and the lights being as they were, walking the distance that he did, an ordinarily cautious man could have seen and could have avoided the accident. Had he proceeded with care, looking and listening, he would not have been injured, and so we conclude that he was guilty of contributory negligence; that the proofs here show that he was guilty of contributory negligence. Therefore there can be no recovery and your verdict must be for the defendant, and you will so find."

BROOKE, J. *(dissenting; after stating the facts).* We are of opinion that the action of the court below was warranted by decisions of our own court. We pass the question raised by defendant that a verdict for plaintiff is not warranted because it must of necessity be based wholly upon conjecture; there having been no eyewitness of the tragedy. We likewise pass the question of defendant's negligence. It may be said, however, in passing, that, if defendant operated its cars on the night in question as detailed by the witness Monarch, such operation would at least raise a question of fact as to defendant's negligence.

Was plaintiff's decedent guilty of negligence as a matter of law? There having been no witness to his death, due care on his part is to be presumed. This presumption must take the case to the jury unless the

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undisputed evidence in the case clearly negatives the presumption. A railroad track is in and of itself, a warning of danger to one approaching it, and before attempting to cross it he is bound to make use of his senses to discover whether or not a train is approaching. *Gardner* v. *Railroad Co.*, 97 Mich. 240 (56 N. W. 602), and cases cited.

In the case at bar, the defendant's right of way across Warren avenue was covered with a network of ten tracks. Plaintiff's decedent was a man 34 years of age and had lived in the vicinity for four years. There was an arc light in the middle of the street, 60 feet distant from the track upon which he was killed. It was a light night. Switching operations were being carried on by an engine, with a constantly ringing bell, some three or four hundred feet away. These operations were in full view of decedent when he reached a point 40 feet distant from Wilson's siding.

In addition to the foregoing, it is undisputed that witness Squires stood at the southerly end of the "drag" of cars, two or three car lengths south of the south sidewalk on Warren avenue, with a lighted lantern with which he signaled the switch engine to back up. It was at the time this coupling was made and the cars pushed north that decedent lost his life, according to all the testimony. Of course, if decedent attempted to go under or between the cars while they were coupled together and completely blocking the highway, he would be guilty of such negligence as would preclude his recovery. We think it would be negligence equally culpable for him to attempt to pass through the opening described by the witness Monarch, when Squires stood in plain view within 100 feet of him, signaling with a lantern, and an engine with its bell ringing approaching in plain view from the south. *Gardner* v. *Railroad Co., supra; Braudy* v. *Railway Co.*, 107 Mich. 100 (64 N. W. 1056); *Lau*

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v. *Railway Co.*, 120 Mich. 115 (79 N. W. 13); *Tucker* v. *Railway Co.*, 122 Mich. 149 (80 N. W. 984), and cases cited.

Judgment should be affirmed.

MCALVAY, J., concurred with BROOKE, J.

BIRD, J. The conclusion of Mr. Justice BROOKE that the deceased was guilty of contributory negligence appears to me to be at variance with the testimony of the witness Monarch. He is the only witness who throws any light on the manner in which the deceased came to his death. He testified in part as follows:

"There are several Detroit, Grand Haven & Milwaukee tracks that cross Warren avenue and Dequindre street. As I walked towards Dequindre street on the south side of Warren avenue, I noticed cars on the tracks. I could see an opening right through. The open way was on the south side of Warren avenue. They were freight cars. This was after 1 o'clock. The section north was pretty close to the sidewalk; that is, they came pretty close to the north side of the sidewalk. The People's Ice Company is on the south side of Warren avenue, right beyond Dequindre. As I walked along Dequindre street I passed and I was between the fire tower and the engine room and I heard a voice, and when I heard that voice I looked around and I heard a crash of cars and when I got to the— The crash came right after I heard some one holler. At that time I was on the sidewalk about 100 feet west from where these cars came together. After I heard this scream or holler and the cars came together, I walked out to the car and waited for it to pass, and I stood there about two seconds and I looked down and saw a body under the car—saw the body lying there. * * *

"*Q.* Now, was there any light on the cars that was standing still or on the end of the car that crashed into the cars that were standing still?

"*A.* No, sir; there was not.

"*Q.* Were there any trainmen where these two cars came together at the time they came together?

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"*A.* No, sir; there was not.
"*Q.* Was any whistle blown before these cars came together?
"*A.* No, sir. * * *
"*Q.* Was the bell of the locomotive ringing?
"*A.* No, sir; I did not hear the bell ringing."

A fair inference to be drawn from this testimony is that there was an opening between the cars on the south side of Warren avenue and that the deceased attempted to pass between and was knocked down and run over by them. If the cars were cut at the sidewalk, and there were no trainmen in the immediate vicinity, nor lights displayed, nor signals being given, which would indicate that the cars were about to be moved, the deceased was not guilty of contributory negligence, as a matter of law, in attempting to pass between them. In streets passing through railway yards it is not uncommon for cars to be left standing near the sidewalk; and, where there is nothing to indicate that they are being "switched," pedestrians do not usually hesitate to pass between them.

The testimony of the witness, considered in connection with the rule that no presumption of negligence can be indulged against the deceased, persuades me that his negligence was a question for the jury and not for the court.

The judgment should be reversed and a new trial granted.

STEERE, C. J., and MOORE, KUHN, STONE, and OSTRANDER, JJ., concurred with BIRD, J.

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FIDELITY & DEPOSIT CO. OF MARYLAND *v.* HIBBLER.

1. APPEAL AND ERROR—FINDINGS OF FACT—QUESTIONS REVIEWABLE.

Unless there is no evidence to support a finding of fact made by the circuit court in trying a case without a jury, or unless the finding is contrary to the undisputed evidence, this court will not review it.

2. INDEMNITY—PRINCIPAL AND SURETY—CONSTRUCTION OF CONTRACT—BOND.

Where plaintiff as surety executed a bond to secure the performance of a building contract, and the principal in the bond defaulted, the plaintiff, which paid the liability in good faith, was entitled to maintain an action against a third party who had agreed to indemnify the plaintiff corporation against any loss, although it had not availed itself as a defense of a clause in the bond requiring suit to be brought within six months after default, defendant's agreement containing a clause that the surety company should be reimbursed for any and all sums paid by it in good faith under the belief that it was liable or that the expenditure was necessary or expedient.

3. SAME.

A contract of indemnity is to be interpreted so as to cover any loss or liability which the parties reasonably appear to have intended it to include, but not such as are expressly excluded or of such a character that it can reasonably be inferred that they were not intended to be within the agreement.

Error to Wayne; Hally, J. Submitted June 5, 1913. (Docket No. 37.) Decided November 3, 1913.

Assumpsit by the Fidelity & Deposit Company of Maryland against William H. Hibbler and Frank B. Hibbler for a loss sustained under an indemnity bond. Judgment for defendants. Plaintiff brings error. Reversed.

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Carey, Armstrong & Weadock, for appellant.

Bernard Goldman and *A. B. Hall,* for appellees.

KUHN, J. The defendant William H. Hibbler, a building contractor in the city of Detroit, being required in the conduct of his business to furnish contractors' bonds, made an arrangement with the plaintiff company to execute such bonds for him as surety, and if the company suffered loss it was to be reimbursed by him and Frank B. Hibbler, his brother. In February, 1906, the plaintiff executed a bond as surety for William H. Hibbler in favor of William H. J. McPharlin and wife, with whom Hibbler had made a building contract to build a double frame house to be completed by May 1, 1906. Hibbler defaulted on this contract, and suit was brought against him and the company on the bond. The cause was tried in the circuit court, and subsequently was carried to this court, the case being reported in 162 Mich. 141. It resulted in a judgment in favor of the McPharlins in the sum of $1,575.76, which was subsequently paid by the plaintiff company. This action was brought upon the indemnity agreement to recover the $1,575.76 and $165.71, disbursements for attorney's fees and other expenses. William H. Hibbler defaulted in the proceedings below, and judgment in full was taken against him, and he does not appear in the present proceedings. The cause was tried before the court without a jury, and the court entered a verdict of no cause of action because it was claimed that Frank B. Hibbler was released from the indemnity agreement by reason of a waiver by the plaintiff company of a provision in the McPharlin bond which provided that all suits thereon should be begun within six months after the first breach of the building contract.

Some controversy is had in the briefs of counsel as to when the first breach of the building contract oc-

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curred. The circuit judge, in his findings, determined it to be on May 1, 1906, the date fixed in the contract for the completion of the house. This finding will not be reviewed by this court. We cannot weigh the evidence nor determine the facts nor review the findings of the court below on questions of fact, unless there is a total want of evidence, or where the finding is contrary to the undisputed evidence. *Cragin* v. *Gardner,* 64 Mich. 399 (31 N. W. 206); *Lamoreaux* v. *Creveling,* 103 Mich. 501 (61 N. W. 783); *Holcomb* v. *Sayers,* 173 Mich. 238 (138 N. W. 1043). It is undisputed that the house was not completed on May 1, 1906, and the record shows no extension given beyond that time.

On November 30, 1906, the plaintiff's vice president wrote to the local representative of the company in Detroit:

"*Gentlemen:*

"I have your letter of the 27th inst., regarding the contract of Wm. H. Hibbler with the McPharlins.

"You are authorized to notify the latter that our company will not exercise the privilege reserved in the bond to complete the same, and we shall expect them to have it completed at the lowest possible expense.

"A copy of your letter to the McPharlins should be sent to our underwriter, Frank B. Hibbler."

When this letter was sent, more than six months had elapsed since the breach of the contract, and it is contended that the waiver of this condition by the company did not bind the underwriter Frank B. Hibbler, because his consent was not obtained. Whether this position is well taken does not become important, in view of the provisions of the indemnity agreement itself, given by the defendants to the plaintiff. This contained the following provisions:

"*Second.* The parties of the first part shall at all times indemnify, and keep indemnified, and save

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harmless the surety company from and against any and all loss, damages, costs and expenses of whatever nature or kind which it shall or may, at any time, sustain, incur, or be put to, for or by reason or in consequence of its having given and executed any such instrument or instruments on behalf of the contractor, including disbursements, costs and counsel or attorney's fees incurred in collecting a premium or a loss sustained on any such instrument, and shall reimburse the surety company for any and all moneys, with legal interest thereon, advanced or loaned by it to the contractor for the purposes of any contract or contracts; and for all costs, counsel fees and expenses which it may incur in investigating any claim made thereunder, or investigating any application for advances or loans, or in prosecuting or defending any action, suit or other proceeding which may be commenced or prosecuted against the contractor, or against the surety company, upon any such instrument or instruments, or in any wise relating thereto. The parties of the first part further agree that in any accounting which may be had between them and the surety company, the surety company shall be entitled to charge for any and all disbursements in and about the matters herein contemplated made by it in good faith, under the belief that it is or was liable for the sums and amounts so disbursed, or that it was necessary or expedient to make such disbursements, whether or not such liability, necessity or expediency existed.

"It is understood and agreed, however, that the liabilities of the said parties of the first part shall not be changed or altered by reason of any modification made, either before or after execution by the parties thereto in any of the terms or conditions of any contract or contracts referred to in any instrument or instruments now or hereafter executed or procured by the surety company. * * *

"And the said parties of the first part hereby waive all notice of any default or defaults, or any other act or acts, giving rise to any claim under any such instrument or instruments given by the surety company on behalf of the contractor as aforesaid, or of any and all liability on the part of the parties of the first part, as well as notice of any and all liability of

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the surety company under any such instrument or instruments executed by it as surety, to the end and effect that the parties of the first part shall be and continue liable to the surety company hereunder, notwithstanding any notice of any kind to which the parties of the first might have been or be entitled, and notwithstanding any defense they might have been or be entitled to make. * * *

"And this agreement of indemnity, shall be liberally construed, so as to fully protect and indemnify the surety company."

In construing contracts of this kind, the rule has been laid down as follows:

"A contract of indemnity should be construed so as to cover all losses, damages, or liabilities to which it reasonably appears to have been the intention of the parties that it should apply, but not to extend to losses, damages, or liabilities which are neither expressly within its terms nor of such character that it can reasonably be inferred that they were intended to be within the contract." 16 Am. & Eng. Enc. Law (2d Ed.), p. 173.

Applying this rule of construction to this agreement, it seems to have been the intention of the parties to make an agreement which was to be an absolute undertaking by the defendants, the indemnitors, to reimburse the plaintiff, the indemnitee, for any loss sustained by it in connection with William H. Hibbler. There is no question but that the plaintiff acted in good faith. When its liability was established it paid its loss, and, under the agreement which the defendants made with it, it should now be reimbursed. The trial judge should have so found.

The judgment of the trial court is reversed, and a new trial granted.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ., concurred.

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FACE v. HALL.

1. FRAUD—VALUE—FALSITY—OPINION—SALES.
   The general rule that statements as to the value of property are mere matters of opinion and will not give rise to an action for fraud, is subject to the exception that false statements of the value of property intentionally made to one who is in ignorance of the quality and value, under such circumstances as indicate a purpose to induce the party to rely upon them, he having no opportunity to examine the subject-matter, may be treated as fraudulent.

2. SAME—SALES—EXCHANGE—CONCEALMENT—EQUITY—CANCELLATION.
   Concealment of the fact that a grocery business had been unprofitable, in connection with false statements relative to the value of the stock of groceries and merchandise exchanged for other property, and with the false representation that the venture had been profitable up to a stated time, made by the seller, entitled the buyer to bring a suit in equity for cancellation based on the fraud, although he had full opportunity to inspect the stock which he purchased.

Appeal from Ingham; Collingwood, J. Submitted June 11, 1913. (Docket No. 75.) Decided November 3, 1913.

Bill by Willard H. Face against Eugene H. Hall, Clarence M. Hall, and Blanche R. Mott for cancellation of an exchange of property. From a decree for complainant and in favor of defendant Mott, defendants Hall appeal. Affirmed.

Samuel H. Rhoads (Cummins & Nichols, of counsel), for complainant Face.

Elmer N. Peters, for defendants Hall.

Stewart & Sabin, for defendant Mott.

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KUHN, J. The complainant, a resident of the city of Lansing, in February, 1912, desirous of acquiring a business in the city of Charlotte, through the medium of a Mr. Tolbert, a real estate man of the latter place, was introduced to the defendants Eugene H. Hall and Clarence M. Hall, who were the proprietors of a grocery store in that city. After some negotiations, the complainant purchased the property, consisting of a stock of merchandise and fixtures, and paid therefor $7,000. This sum was arrived at by placing a price of $3,500 on the stock of merchandise and $3,500 on the fixtures. The payment was made by complainant turning over to the Halls equities in certain real estate in Lansing at $3,000 and giving $4,000 in notes secured by a chattel mortgage on the stock of merchandise. The defendants Eugene H. Hall and Clarence M. Hall, within a few days after giving up possession of the store, traded the chattel mortgage and notes which they had received from complainant to Frank Mott, acting as agent for his wife, Blanche R. Mott, one of the defendants herein, and received therefor certain real estate in the city of Battle Creek. The complainant, soon after taking possession, became suspicious that he had not received what he supposed he had purchased, had an inventory taken, and found that the stock inventoried at but $1,682.16. He thereupon filed his bill of complaint, alleging fraud and praying that his property be restored to him. The defendant Blanche R. Mott filed an answer and cross-bill, asking for affirmative relief, the restoration to her of her property. Answers were filed by the other defendants. The cause was heard, and thereafter a petition was filed to amend the bill of complaint to conform to certain proofs introduced on the hearing. The amendment was allowed, further proofs were taken, and a decree made granting the relief prayed

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for by the complainant and the defendant Blanche R. Mott.

The sole question in this case is whether fraudulent representations were made to the complainant and the defendant Blanche R. Mott by the Halls as to the amount of the stock of merchandise and as to whether the business was a profitable one or not, which were relied upon by them in making the trades.

It is strongly urged by counsel for the defendants Hall that the doctrine of *caveat emptor* applies; that the record discloses that the complainant was a man of considerable business experience, having been in the grocery business before; that he went over the stock several times and was satisfied with the price placed upon it by them, and no representations were made which were not in fact true and based upon their best information.

To determine the issue thus formed necessitates a careful study of the record. It is the claim of the complainant, and he so testified, that the defendants assured him that the stock would inventory at an invoice value of $3,500. The store in question had been purchased by the defendant Eugene H. Hall in April, 1911, and during the following 9 or 10 months several other people became interested in the business, but at the time of the sale to the complainant in February, 1912, the business was owned by the defendants Hall. It is also claimed that they represented to complainant that the business had been a profitable one up to some time in the fall of 1911, when they changed from a credit system to a cash system, which resulted in a loss of patronage. It appears conclusively, however, that the business was an unprofitable venture from the time the Halls took charge of it, and they lost more than $3,000 during the 10 or 11 months they owned the business and were obliged to compromise with their creditors.

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Their excuse for not telling Mr. Face, the complainant, about it is stated by the defendant Clarence M. Hall, who testified that he did not think he had to tell him about it and claimed that the question was not asked of either him or his brother.

Mr. Tolbert, the agent, who was a witness for the defendants and who had been a partner for a short time in the firm of Hall Bros., a few months before the sale involved in this controversy took place, frankly stated that the business was losing money too fast to suit him, but when Mr. Face asked him about the business he did not tell him about his experience in the business but turned him over to the defendants Hall to give him the information.

It is claimed that in December, 1911, Frank Mott had a talk with the Halls and they represented to him that the stock and fixtures at that time were worth $8,000. At the time they traded the notes and chattel mortgage, Mr. Mott stated that they told him that the value of the stock had not changed from what it was when they represented it to be worth $8,000 and told him that they had sold it to Mr. Face for $7,000.

It does not seem probable that, if defendants had told complainant the truth about their financial condition, their losses in the business, and the true value of the stock, he would have purchased the stock for the consideration he gave for it. If complainant's testimony is to be believed, the conclusion must be arrived at that the defendants Hall deliberately and intentionally misrepresented the value of their stock and the condition of the business to him in order to make the trade, and these representations were the inducing cause of the trade.

In the case of *Pinch* v. *Hotaling*, 142 Mich. 521, 525 (106 N. W. 69, 70), Mr. Justice MONTGOMERY stated the rule concerning misrepresentations as to value, as follows:

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"The contention made is that the statement of value was a mere matter of opinion, and cannot be made the basis of an action for fraud. This is a statement of the general rule, but the rule established by the weight of authority is that false statements of value intentionally made to one who is in ignorance of the quality and value, under circumstances indicating a purpose that such statements are to be relied upon, and where the party to whom they are made has no opportunity to examine the property, may be treated as an affirmation of fact and fraudulent. See 14 Am. & Eng. Enc. Law (2d Ed.), p. 125; *Simar* v. *Canaday*, 53 N. Y. 298 [13 Am. Rep. 523]; *Cressler* v. *Rees*, 27 Neb. 515 [43 N. W. 363, 20 Am. St. Rep. 691]; *Hedin* v. *Surgical Institute*, 35 L. R. A. 427, note (62 Minn. 146 [64 N. W. 158, 54 Am. St. Rep. 628]); *Collins* v. *Jackson*, 54 Mich. 186 [19 N. W. 947]; *Maxted* v. *Fowler*, 94 Mich. 109 [53 N. W. 921]; 16 Cyc. p. 749."

It is true that if all that were relied upon in this case were simply the representations as to value, in view of the fact that complainant had an opportunity to examine the property and satisfy himself as to the values, it is doubtful if he could obtain the relief prayed for. However, his position is fortified by the representation that the business had been a profitable one, and there was no way for him to disprove it. The excuse made by one of the defendants Hall that he did not consider it necessary for him to tell, would under his own statement bring the case within the doctrine announced in *Fred Macey Co.* v. *Macey*, 143 Mich. 138, 153 (106 N. W. 722, 727, 5 L. R. A. [N. S.] 1036), in which case this court said:

"Fraud may be consummated by suppression of facts and of the truth, as well as by open false assertions. Fraudulent concealment is a matter of equitable jurisdiction as well as fraudulent assertion."

We are satisfied from this record that a fraud has been perpetrated on the complainant and the defend-

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ant Blanche R. Mott, and the trial judge properly granted the relief prayed for.

The decree is affirmed, with costs to the complainant and the defendant Blanche R. Mott.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ., concurred.

In re JOHNSON'S ESTATE.

WILLIAMS *v.* KNISKERN.

1. TAXATION — SPECIAL ASSESSMENTS — CORNER LOT — MUNICIPAL CORPORATIONS—PAVING TAX.

   An improvement tax for paving may be assessed against a corner lot for work done on both streets on which it lies, since it is benefited by the pavement on either street.

2. COVENANTS—PAROL EVIDENCE—VARYING DEED BY ORAL TESTIMONY.

   It is incompetent to show by parol, in an action on a vendor's covenant against incumbrances, that the vendee agreed by parol to pay a tax which had become a lien on the property at the time of the conveyance.

Error to Muskegon; Sullivan, J. Submitted June 11, 1913. (Docket No. 82.) Decided November 3, 1913.

Albert L. Williams presented a claim against the estate of Anna Johnson, deceased, for breach of a covenant in a deed. From the allowance of the amount claimed, Philip W. Kniskern, administrator,

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appealed to the circuit court. Judgment for claimant. Defendant brings error. Affirmed.

Philip W. Kniskern, for appellant.

Cross, Vanderwerp, Foote & Ross, for appellee.

MOORE, J. The following is taken from the brief of counsel for appellant:

"September 28, 1905, Anna Johnson transferred the southerly 59 feet in width of lot 3, of block 20, Sanford's addition to the village (now city) of Muskegon, which premises are also now known as the southerly or southeasterly 59 feet in width of lot 3, of block 239, according to the revised plat of the city of Muskegon April 9, 1903; said strip having a frontage of 59 feet on Ransom street, and extending same width in an easterly direction to the line between lot 3 and lot 5, of same block. This deed contained a warranty clause as follows:

"'That at the time of the ensealing and delivery * * * she is well seized of the above-granted premises in fee simple; that they are free from all incumbrances whatever; and that she will, and her heirs, executors, and administrators shall, warrant and defend against all lawful claims whatever.'

"This deed was recorded September 29, 1905. The expressed consideration was $1,250. * * *

"At the time of the making of the deed there were certain unpaid back taxes. This controversy is as to who should pay them, the grantor or the grantee. The grantee has paid them, and has brought this proceeding against the estate of the grantor to recover back the amount of such payments. The grantor's estate denies liability upon two grounds: (1) That the record does not show that these taxes were legally assessed against the land, or ever became a valid lien thereon. (2) That the grantee expressly agreed to pay these taxes as a part of the agreed consideration for the conveyance. The taxes involved were assessed against the premises in two improvement districts. * * *

"Resolutions were offered in evidence of the proceedings of the council May 8, 1902, reciting action

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of the council and board of assessors on the 8th day of May, 1902, considering objections that might be made to the special assessments of Delaware street improvement district No. 2, at which time it appears said roll was confirmed. * * * On the 19th of June, 1902, like proceedings were had with reference to the special assessment roll of Ransom street improvement district No. 2. * * *

"The record discloses the fact that the assessment rolls of both districts covered the 59 feet belonging to claimant on lot 3; that the assessment was by frontage. This lot was made to contribute to both improvements, notwithstanding there was a full lot and seven feet lying between this description and that one, which fronted on Delaware street. It was a separate property, with a house standing thereon, and its only connection with the other property was that the city assessor had assessed the three lots as one parcel. * * *

"The charter for the city of Muskegon provides that the council must determine by resolution the necessity for the proposed improvement:

"Title XI, section 1. The cost of the improvement to be assessed must not be over 25 per cent. of the last assessment on the premises abutting the street to be improved.

"Title XI, section 2. The assessment must be by benefits or by frontage.

"Title XI, section 5. Notice must be given appointing time and place for reviewing the assessment roll.

"Title XI, section 7. Council to require board of assessors to apportion the tax.

"Title XI, section 13. Local Act 102, approved March 19, 1901.

"There is no evidence in this case that any one of the foregoing provisions was complied with.

"While it may be the rule that between the State and the taxpayer the burden of proof is on the person disputing the legality of the tax, and holding the tax roll *prima facie* proof of the regularity of all the proceedings leading up to it, the reasons for the adoption of such rule does not apply as between the parties to a covenant in a deed for a title free of any lien"—citing cases, among them *White* v. *Gibson*,

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146 Mich. 547 (109 N. W. 1049); *Grand Haven Basket Factory* v. *City of Grand Haven*, 174 Mich. 279 (140 N. W. 609); *Van Zanten* v. *City of Grand Haven*, 174 Mich. 282 (140 N. W. 471)—to which cases reference will be made later.

We again quote from the brief:

"Where only one of a tract of several lots owned by the same person abuts upon the street, an assessment can only be levied against the abutting lot, unless the whole tract is used by the owner in disregard of the lot lines. [*Langlois* v. *Cameron*] 201 Ill. 301 [66 N. E. 332; *Smith* v. *City of Des Moines*], 106 Iowa, 590 [76 N. W. 836; *Barber Asphalt Paving Co.* v. *Peck*], 186 Mo. 506 [85 S. W. 387; *Wolfort* v. *City of St. Louis*], 115 Mo. 139 [21 S. W. 912; *City of Chester* v. *Eyre*], 181 Pa. 642 [37 Atl. 837]. Property separated from a street by a strip of ground, no matter how narrow, cannot be assessed as frontage; [*Crane* v. *French*] 50 Mo. App. 367, holding that an unplotted piece of land cannot be assessed where it was separated from the street by a strip of land five feet in width. 28 Cyc. p. 1125."

The following appears in the record:

"Alderman Reitdyk offers the following resolution, and moves its adoption:

"Whereas, this council and board of assessors did meet on the 8th day of May, 1902, for the purpose of reviewing and considering any objections that might be made to the special assessment on the lots and parcels of land contained in the special assessment district, known as Delaware street improvement, district No. 2; and, whereas, said roll was confirmed by the council and board of assessors as heretofore reported:

" 'Therefore be it resolved, that the said special assessment roll for the Delaware street improvement district No. 2 be and the same is hereby confirmed by the concurrence of two-thirds of all the aldermen elect, and the amounts assessed to the various parties be collected directly from the roll. And be it further resolved, that the amounts of said special assessment be divided into six equal installments payable as follows: The first installment is due and payable immediately upon the adoption of this resolution; the second installment is due and pay-

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able on the 8th day of May, A. D. 1903; the third installment is due and payable on the 8th day of May, A. D. 1904; the fourth installment is due and payable on the 8th day of May, 1905; the fifth installment is due and payable on the 8th day of May, 1906; the sixth installment is due and payable on the 8th day of May, 1907. All deferred payments of installments shall draw interest from this date to the date of payment at the rate of five per cent. per annum, payable annually on the 8th day of May in each and every year until the same is fully paid.

"'And be it further resolved, that the recorder be and he is hereby instructed to indorse a certificate on said roll to show the date of the confirmation thereof. Dated May 8, 1902.

"'[Signed] HARRY A. REITDYK.

"Adopted by the following vote, viz.: Ayes—Aldermen Damm, Bomers, Hanson, Averill, Reitdyk, Monroe, Robinson, Sauer. Nays—None."

A special assessment roll was offered in evidence, upon which appeared the following:

"On Delaware street improvement district No. 2 assessment against lots 1, 2, and 3, block 20, Sanford's addition to the city of Muskegon, assessed to Anna Johnson, total assessment, $200.10.

"*The Court:* Carried out in installments?

"*A.* Yes, sir."

Then followed the installments.

"The certificate accompanying the same reads:

"'STATE OF MICHIGAN, } ss.:
"'CITY AND COUNTY OF MUSKEGON. }

"'We, the undersigned, appointed by resolution of the council of said city, adopted the 27th day of March, 1902, a board of assessors to levy a special assessment on the lots, pieces, and parcels of land in said resolution described and constituting the special assessment district designated Delaware improvement district No. 2, do hereby certify and return that in accordance with said resolution we have levied on the foregoing assessment roll the sum of $2,879.59 on the said lots, pieces, and parcels of land, and have assessed to each lot or parcel of land such relative portion of such sum as the length of such lot or parcel fronting on said improvement bears to the whole

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frontage of all the lots or parcels assessed; that we have entered and described on said roll all the lots, premises, and parts of lots in said resolution directed to be assessed, the valuation of each description, and the name or names of the persons chargeable with the assessments thereon.

" 'Dated Muskegon, Mich., May 1, 1902.

[Signed] " 'H. J. HANSON,
" 'MAX LANGE,
" 'C. S. GAMBLE,
" 'Board of Assessors for Delaware Street Improvement District No. 2.

" 'STATE OF MICHIGAN, }
" 'COUNTY AND CITY OF MUSKEGON. } ss.:

" 'I do hereby certify that the council did, on the 8th day of May, A. D. 1902, by a vote of two-thirds of all the aldermen elect, confirm the foregoing assessment roll, and did, by the resolution confirming said roll, provide for the payment of said assessment in six equal annual installments.

" 'Witness my hand this 9th day of May, A. D. 1902.

" 'P. P. MISNER,
" 'Recorder of the City of Muskegon, Mich.

" 'STATE OF MICHIGAN, }
" 'THE CITY AND COUNTY OF MUSKEGON. } ss.:

" 'To the Treasurer of the City of Muskegon:

" 'You are hereby commanded to collect from each of the persons named in the foregoing assessment roll the first installment of the amount of money assessed, and set opposite his name therein, with annual interest at the rate of five per cent., and, in case any person named in said roll shall neglect or refuse to pay said first installment of the assessment on demand, then you are commanded to levy and collect the same by distress of the goods and chattels of such person, and to return the amount so collected to the credit of Delaware street special paving fund No. 2, and return said roll and warrant, together with your doings thereon, to the recorder of said city in sixty days from the date of this warrant.

" 'Given under my hand this 10th day of May, 1902.

" 'THEO. D. MORGAN,
" 'Mayor of the City of Muskegon.

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"'STATE OF MICHIGAN,
"'COUNTY AND CITY OF MUSKEGON. } ss.:

"'I do hereby certify that I have compared the foregoing copy of the special assessment roll for Delaware street improvement district No. 2 with the original roll on file in my office, as confirmed by the council of said city, and that it is a true and correct copy of said original roll and of the whole thereof.

"'Witness my hand and the official seal of said city this 10th day of May, 1902.

"'P. P. MISNER,
"'Recorder of the City of Muskegon.

"'[City Seal.]'

"*Witness:* Lots 1, 2, and 3 of block 20, were assessed as one description. The fourth installment was not paid, and was reported delinquent October 23, 1905."

Later these delinquent taxes were put upon the roll. Like proceedings were had as to the Ransom street assessment.

The charter of Muskegon provides, among other things, as follows:

Sections 9 and 10 of Title XI, read as follows:

"SEC. 9. When any special assessment shall be confirmed by the council, it shall be final and conclusive; but no such assessment shall be confirmed, except by the concurrence of two-thirds of all the aldermen elect.

"SEC. 10. All special assessments shall from the confirmation thereof, constitute a lien upon the respective lots or parcels of land assessed, and shall be a charge against the person to whom assessed until paid."

Section 20 of title XI provides that the special assessment roll, and a certified copy of the order or resolution confirming the same, shall be *prima facie* evidence of the regularity of all the proceedings in making the assessment.

Section 12 of title X of said act reads as follows:

"SEC. 12. No general or special tax, special assess-

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ments or charges created, ordered or assessed in said city, upon any property therein, shall be held illegal or invalid, for any matter of form, in any matter not affecting the merits of the case, and which shall not injure or prejudice the rights of the party assessed; and all taxes and special assessments and charges created, ordered and assessed in said city shall be presumed to be legally assessed, until the contrary is affirmatively shown, and no such presumption shall be rebutted, or any sale for taxes, special assessments and charges created, ordered or assessed in said city, be rendered invalid by showing that any paper, certificate, return or affidavit required to be made and filed in any office, is not to be found in the office where the same ought to be filed or found, but until the contrary is proved the presumption shall be, in all such cases, that such paper, certificate, return or affidavit was made and filed in the proper office."

The circuit judge made the following findings of fact:

"(1) That the said Anna Johnson in her lifetime, and on, towit, September 23, 1905, and for a long time prior thereto, had been and was the owner of lots 1 and 3, of block 20, of Sanford's addition to village, now city, of Muskegon, and said lots had been and were occupied as one parcel of real estate, upon which was situated a large brick apartment house, containing six flats; said building being upon practically all of said lots 1 and 2, and also extending upon and occupying the westerly seven feet of said lot 3, the frontage of said three lots, when considered as a whole, being 132 feet on Delaware street and 198 feet on Ransom street.

"(2) That prior to September 23, 1905, the city of Muskegon, acting under and pursuant to the provisions of its charter, caused said Delaware street to be paved, and caused the expense of said street improvement to be borne by special assessments upon lands fronting on and adjacent to the improvement. That a special assessment tax for the paving of said Delaware street was levied on said lots 1, 2, and 3, and became a lien thereon on May 8, 1902, and, under the provision of said charter of said city of Mus-

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kegon, continued to be a lien thereon until paid; the amount of said special assessment being divided into six installments, one of which should be collected each year."

He made a like finding as to the Ransom street proceeding.

"That at the time of the aforesaid conveyance certain of the taxes for the special assessment for the paving of Delaware street, and also certain of the taxes for the special assessment for the paving of Ransom street, were then and there valid liens upon the said real estate so conveyed to the said Albert L. Williams by the said Anna Johnson, as aforesaid."

He rendered a judgment in favor of the plaintiff for $144.12, the amount of taxes he paid.

We have already seen that the special assessment rolls and the confirmation of the assessments in due form appear in the record. It also appears that the trial judge found the property was occupied as an entirety, and there is no testimony to show that this was not true. The record does not disclose that Mrs. Johnson questioned the method of spreading these taxes. On the contrary, it is shown that she paid the various installments as they became due up to the time of the making of the deed in this case.

This record is entirely different from those in the cases cited by counsel which we have mentioned earlier in the opinion. The case seems to be within *Nowlen* v. *City of Benton Harbor*, 134 Mich. 401 (96 N. W. 450), where the three lots had a frontage of 150 feet on East Main street and of 165 feet on Wall street. In that case, one of the lots was sold before proceedings to pave were taken, and the other two lots were included as one parcel in the assessment districts for each street. Chief Justice HOOKER, speaking for the court, said:

"It is obvious that it is impracticable to limit a corner lot to one assessment district, except by the arbi-

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trary method of dividing the lot by some sort of an imaginary line, having one terminus at the corner of the lot where the streets intersect and the other at such place as the council shall designate; and it is apparent that the entire premises used as a parcel fronting on both streets share in the benefit to be derived from the use of the improvement upon either street, be it sewer, pavement, or any of the utilities, such as water or gas. When the benefits are apportioned by frontage, the total cost of the two improvements would fall upon the entire parcel, whichever method might be adopted, unless it be where there is such a disparity of cost that a levy of the assessments separately might exceed the statutory limit upon one parcel and fall below it on the other. We are of the opinion that it was competent for the council to say that this entire parcel was benefited by both improvements, and to assess it for each, provided it did not impose a greater burden than the statute permits, and it follows that the land may be in two assessing districts. We understand that the case of *Boehme* v. *City of Monroe,* 106 Mich. 401 (64 N. W. 204), does not hold to the contrary."

See, also, *City of Chester* v. *Eyre,* 181 Pa. 642 (37 Atl. 837); *Wolfort* v. *City of St. Louis,* 115 Mo. 139 (21 S. W. 912); *Goodrich* v. *City of Detroit,* 123 Mich. 559 (82 N. W. 255).

2. Did the court err in shutting out testimony to the effect that Mr. Williams agreed to pay these taxes? Counsel say this was error; that you may always show what is the consideration for the giving of a deed—citing *Mowrey* v. *Vandling,* 9 Mich. 39; *Breitenwischer* v. *Clough,* 111 Mich. 6 (69 N. W. 88, 66 Am. St. Rep. 372); and many other cases. An examination of the cases shows the question arose where the consideration for the deed was involved, and not where a covenant in a deed was to be construed.

The case of *Simanovich* v. *Wood,* 145 Mass. 180 (13 N. E. 391), which was an action for breach of a covenant of warranty against incumbrances in a

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deed, the incumbrance consisting of an unpaid betterment assessment, would seem to be in point. In that case the court said:

"This is an action of contract on a covenant [of warranty] against incumbrances in a deed from the defendant to the plaintiff. It is admitted that an unpaid assessment upon the land was an incumbrance within the covenant. *Carr* v. *Dooley*, 119 Mass. 294. The defendant offered to prove, by parol testimony, that, at the time the deed was given, and as a part of the consideration, the plaintiff promised to pay said assessment.

"This evidence was rightly rejected. It directly varied and contradicted the written contract of the defendant. The covenant is against all incumbrances. The evidence offered was for the purpose of showing an oral agreement that the incumbrance created by the assessment was not within the covenant.

"While for some purposes it is competent to show what the real consideration of a deed is, a party cannot, under the guise of showing what the consideration is, prove an oral agreement, either antecedent to or contemporaneous with the deed, which will cut down or vary the stipulations of his written covenant. This would violate the well-settled rule of law which will not permit a written contract to be varied or controlled by such testimony. *Howe* v. *Walker*, 4 Gray [Mass.], 318; *Spurr* v. *Andrew*, 6 Allen [Mass.], 420; *Flynn* v. *Bourneuf*, 143 Mass. 277 (9 N. E. 650, 58 Am. Rep. 135). Exceptions overruled."

See, also, *Hayes* v. *Livingston*, 34 Mich. 384 (22 Am. Rep. 533); *Dye* v. *Thompson*, 126 Mich. 597 (85 N. W. 1113); *Morrill* v. *Morrill*, 138 Mich. 112 (101 N. W. 209, 110 Am. St. Rep. 306, 4 Am. & Eng. Ann. Cas. 1100); *Longe* v. *Kinney*, 171 Mich. 312 (137 N. W. 119).

Judgment is affirmed.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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McMILLAN v. MILLER.

1. CORPORATIONS—ACCOUNTING—PARTIES—EQUITY.
   In an accounting between stockholders of a corporation and its officers and directors, the corporation is a necessary party.

2. SAME—OFFICERS AND DIRECTORS—MANAGEMENT.
   Equity will not interfere with the management of a corporation unless fraud or misconduct or some of the wrongful acts enumerated by 3 Comp. Laws, §§ 9757-9759 (5 How. Stat. [2d Ed.] § 13530), are set up by the bill.

3. SAME—FRAUD—OFFICERS AND DIRECTORS.
   Averments of complainant's bill for an accounting that the board of directors voted to defendants as officers of a corporation salaries of $100 a month, although when the complainants bought their stock defendants agreed not to receive any salary for their services, and averments that defendants had executed certain obligations of the corporation to their relatives, do not import fraud, in the absence of any charge of fraudulent intent.

4. SAME—ADEQUATE REMEDY AT LAW.
   For breach of the alleged contract, complainants have an adequate remedy at law.

Appeal from Wayne; Hally, J. Submitted June 16, 1913. (Docket No. 99.) Decided November 3, 1913.

Bill by Enos L. McMillan and Neil McMillan, Jr., against Theodore Miller and others. From an order sustaining defendants' demurrer to the bill of complaint, complainants appeal. Affirmed.

Galloway & Graham, for complainants.

G. Lewis Carter, for defendants.

KUHN, J. The complainants and the defendants

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were all stockholders in a corporation known as the Miller Car Company. The bill of complaint was filed, as stated in complainants' brief, to obtain an accounting from the defendants. The material allegations in the bill of complaint are that the defendants promoted the corporation; that two of the defendants were elected president and secretary and devoted but little time to the business; that the board of directors voted two of the defendants salaries of $100 per month; that the defendants sold their stock interest in the corporation; that complainants had no knowledge of what became of the receipts from the sale of the stock of the corporation; that the records of the corporation were turned over by the defendants in a mutilated and unintelligible condition to the complainants; that two of the defendants, while officers of the corporation, had executed certain obligations of the company to certain persons, relatives of the defendants, "but for what purpose or reason the said obligations were so created complainants are not advised;" that certain of the defendants are claiming obligations of the company to be due and demand for payment has been made. It is also alleged that the complainants entered into a contract with the defendants to purchase stock in the corporation upon the consideration and understanding that the officers thereof should not be allowed to draw a salary, and that subsequently two of the defendants drew salaries at $100 per month. To this bill the defendants demurred for the following reasons:

"*First.* Because it appears by said bill that the complainants have no interest in the subject-matter of said bill of complaint which entitles them to maintain their said bill.

"*Second.* Because the transactions as alleged in said bill of complaint were between the defendants and a third party, the Miller Car Company, which is not a party to the said bill of complaint.

"*Third.* Because it appears by said bill of com-

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plaint that each of the complainants have adequate remedies at law.

"*Fourth.* Because it appears from the said bill that no act or transaction alleged in said bill was contrary to any right of the complainants or was in violation of any duty of the defendants, or either of them, to the complainants, and that the complainants suffered no wrong or injury by the defendants, or in consequence of any act or transaction set forth in said bill, of which a court of equity can take cognizance.

"*Fifth.* It appears by said bill that the complainants purchased stock in a certain corporation under certain representations and agreements constituting a contract by and with the defendants, which contract, it is alleged, was broken, and for which breach the complainants have a complete and adequate remedy at law.

"*Sixth.* Because it appears that said bill sets up two distinct matters and causes; that it sets up a contract between each of the complainants and the defendants, and also sets up certain transactions between the defendants and the Miller Car Company, a corporation; and that the bill is altogether multifarious."

The trial court sustained the demurrer and in support of his action gave the following reason:

"The bill as drawn made the Miller Car Company a necessary party because no decree could be made for the payment of any money or the refunding of any money on the portion of the accounting which was also asked for unless the Miller Car Company were a party to the suit."

Five days were given complainants to amend their bill so as to make the Miller Car Company a party defendant. This complainants failed to do, and the bill of complaint was dismissed. Was the circuit judge correct in sustaining the demurrer for the reason given? We think he was, as the case comes clearly within the ruling in the case of *Coxe* v. *Hart*, 53 Mich. 557, 558 (19 N. W. 183), upon which the trial judge relied. In that case this court said:

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"So far as this defendant is concerned, the relief sought is for the benefit of the corporation, and if he releases or accounts, it must be to the corporation and not to the complainant, and in case he has any counter-equities those would also exist against the corporation. It is therefore an indispensable party, so far as he is concerned, and so far as all the defendants are concerned who are charged with defrauding it. *Cicotte* v. *Anciaux*, 53 Mich. 227 [18 N. W. 793]."

As this is a defect which could be rectified, and as the other reasons for demurrer state that the bill does not allege grounds for equitable relief, it is well to consider whether, if the Miller Car Company were made a party, the complainants would be entitled to any relief in this proceeding. Complainants say that the equity court has jurisdiction to give the relief prayed for by virtue of sections 9757-9759, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 13530). A careful examination of the eight provisions of section 9757 shows, however, that the allegations of the bill do not come within any one of them. The bill does not charge that the defendants failed to account for the funds and property committed to their charge as officers of the corporation, or that the defendants have lost or wasted by violation of their duties any sums of money or property, or that they have acquired any of the property of the corporation to themselves, or that an officer should be suspended or removed for abusing his trust or because guilty of gross misconduct, or that there are any vacancies to fill, or that any alienation of property of the corporation has been or is about to be made by the officers, contrary to law. The complainants have no right to such an accounting as prayed for unless authority is conferred by statute.

In *Cicotte* v. *Anciaux*, 53 Mich. 227, 235 (18 N. W. 793), the court said:

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"In the absence of a statute, it is well settled, and has always been recognized law, that courts of equity can never interfere with the action of such officers as have been placed by the corporation itself in the control of its affairs, unless either in excess of their discretion or in aggravated cases of misconduct amounting to actual or constructive fraud."

See, also, *Aldrich* v. *Chair Co.*, 152 Mich. 369 (116 N. W. 461); *Fuller* v. *McCormick*, 156 Mich. 518 (121 N. W. 280).

If fraud were properly charged, the bill could be maintained under authority of *Miner* v. *Ice Co.*, 93 Mich. 97 (53 N. W. 218, 17 L. R. A. 412), but in no portion of the bill of complaint is it charged that any act of the defendants complained of was done with a fraudulent intent. Fraud cannot be inferred from these acts, as they are proper and correct transactions and do not of themselves import fraud. *Hale* v. *Chandler*, 3 Mich. 531.

With reference to the claim of complainants that they contracted to purchase the stock in consideration that no salaries were to be paid the officers, it is clear that, if complainants' claim is correct, they have an adequate remedy at law. As stated in defendants' brief:

"The amount of those salaries paid out of the assets of the corporation has reduced the value of complainants' stock in proportion to their holdings, and for the wrong alleged in the payment thereof complainants may recover their loss from the defendants at law."

The order of the circuit judge sustaining the demurrer will be affirmed, with costs of both courts to defendants. The record will be remanded, and complainants will be allowed 20 days to amend their bill, if they desire so to do.

STEERE, C. J., and MOORE, McALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ., concurred.

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KOLCHOWSKY *v.* DETROIT UNITED RAILWAY.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—STREET RAILWAYS.

In an action for personal injuries sustained by plaintiff in driving his automobile across defendant's tracks without observing a lighted car which collided with the motor car, evidence *held*, to warrant the trial court in directing a verdict for defendant because of plaintiff's contributory negligence.

Error to Wayne; Van Zile, J. Submitted June 16, 1913. (Docket No. 88.) Decided November 3, 1913.

Case by Charles Kolchowsky against the Detroit United Railway for personal injuries. Judgment for defendant, and plaintiff brings error. Affirmed.

Thomas J. Mahon and *Thomas W. Thompson*, for appellant.

Corliss, Leete & Joslyn (William G. Fitzpatrick, of counsel), for appellee.

BIRD, J. This cause was tried jointly with the case of *Colborne* v. *Railway, ante,* 139 (143 N. W. 32). In that case the right of the plaintiff to recover for her injuries was denied on the ground of the negligence of the driver of the automobile in which she was riding. Kolchowsky, the plaintiff in this case, was the driver of the automobile. He likewise brought suit to recover for his injuries, and on the same evidence the trial court directed a verdict for the defendant, and the case is now here for review. Inasmuch as it was adjudged in the *Colborne Case*

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that Kolchowsky's negligence would prevent a recovery, it follows that for the same reason no recovery can be had in his case. The judgment of the trial court is affirmed.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and OSTRANDER, JJ., concurred.

NELSON v. LESZCZYNSKI-CLARK CO.

1. DURESS—PAYMENT—RECOVERY BACK OF MONEY PAID UNDER THREAT OF PROSECUTION.

   Where plaintiff claimed that he executed his promissory note to defendant to avoid threatened prosecution for an alleged shortage which defendant charged had arisen while plaintiff was in its employ, and, on the following day when the note matured, paid the amount promised, and there was no evidence that the pressure had been removed in the meantime, the evidence sufficiently showed duress and its continuance to the time of payment.

2. SAME—BILLS AND NOTES—COMPROMISE AND SETTLEMENT.

   The discontinuance of an attachment suit that defendant had instituted against plaintiff, but which he knew nothing about at the time he gave the note and of which he only incidentally learned on the day he paid it, was not such consideration as to support the payment or the claimed settlement.

3. SAME—TRIAL—CHARGE.

   The court did not commit error in charging the jury that plaintiff could recover only if he proved that he was induced by duress to pay a debt he did not owe, or was misled by fraudulent representations that the amount of indebtedness arising out of the shortage was greater

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than it really was, and plaintiff paid the amount in reliance on such statements, in which case he could recover the difference between what he paid and what he, in fact, owed.

Error to Huron; Beach, J. Submitted June 17, 1913. (Docket No. 9.) Decided November 3, 1913.

Case by Edward B. Nelson against the Leszczynski-Clark Company, John G. Clark and John Ryan for the recovery of money paid under duress. Judgment for plaintiff. Defendants bring error. Affirmed.

George M. Clark (Wilbur J. Beach, of counsel), for appellants.

Hall, De Foe & Hall, for appellee.

KUHN, J. The defendant corporation is organized under the laws of this State, and is engaged in the general mercantile business in the village of Palms, Sanilac county. The defendants John G. Clark and John Ryan were stockholders in the corporation, which was capitalized at $3,000. The plaintiff, a young married man of the age of 24, was employed by the defendant company on December 3, 1909, as the manager of its store, and remained in charge until November 28, 1910. Previous to this employment he had spent nearly all his life on a farm, with the exception of one year when he had worked as a rural mail carrier. He had also worked for about six months in a grocery store in a country village, and for three months prior to his employment by the defendant company had been engaged in putting up orders in the wholesale house of Clark & McCaren Company, at Bad Axe. The business management had been taken over in May, 1909, by a Mr. Potts, who, because of ill health, was obliged to leave the business in August, and from that time up to the

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time of plaintiff's employment Mrs. Potts, assisted by a young man named Welsh, had charge.

An inventory of the business was taken at the time Potts assumed control; but no inventory was again taken until after the plaintiff had become dissatisfied with his position, and had made arrangements to go West with relatives. When this inventory was compared with the one made in May, 1909, it was found that a loss of $1,728.17 had been sustained in the interim. The plaintiff was sent for, and on December 6, 1910, went to Palms, where he met Mr. Clark and Mr. Leszczynski at the store. The inventories were compared, and after telephoning to defendant Ryan, who is the cashier of a bank at Bad Axe, it was arranged to go to that place the same evening.

There is considerable dispute as to what occurred at Palms and at Bad Axe. It is not claimed that threats were made at Palms; but it is the claim of the plaintiff that in a private office of the bank at Bad Axe he was told that there was a shortage in his accounts of $3,000, and that, unless he made a settlement of some kind, they would immediately have him "arrested and brought up on a charge of embezzlement, grand larceny, and criminal carelessness;" that, although he denied any knowledge of a shortage, the threats were repeated, and he was told that he had better settle the matter and keep it quiet, because it would bring disgrace to his wife and family and his own people; that he was told that, although the shortage was $3,000, because of sympathy for his wife and baby, they would accept $2,000. Thereupon he signed a promissory note for that amount, dated December 6th and payable one day after date. He also signed and acknowledged before a notary public at the same time another paper, which read as follows:

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"BAD AXE, MICH., December 6, '10.
"I have this day given to Leszczynski-Clark Company my note for two thousand dollars, payable one day after date. If said note is paid when due said company is to release me from all debts and obligations which I admit that I owe them; should I fail in paying said note, said company have the right to commence criminal and civil action against me."

The wife of the plaintiff was sworn as a witness, and testified that when he arrived home that evening he was crying, stating that everything had been taken from him. Other witnesses testified as to his mental condition for some time after the settlement. On the day after the settlement he went to the office of Mr. Clark, and demanded the return of his note, which was refused. He thereupon, accompanied by a brother-in-law, went to the law office of Mr. Boomhower in Bad Axe, who at the time was the prosecuting attorney of Huron county, where he was also joined by his two brothers. He claims to have explained the situation to Mr. Boomhower; that he owed the defendants nothing; of the giving of the note and the threats; that Mr. Boomhower, after consulting the statute, told him that, if a charge were preferred against him, and he were found guilty, he could be sentenced to prison for not to exceed five years; that it would probably cost him $2,000 to fight the case, even if he won; that while in Mr. Boomhower's office he also learned that the defendants had that morning commenced a suit against him by placing an attachment on his farm; that thereupon he went to the bank with his brothers, and arranged to turn a farm which he owned over to them as security, and they took up his note by giving their own note for a like sum, which they paid the following day.

The defendants strongly denied making any threats, and testified that the plaintiff admitted the shortages, and at the interview had with him he stated that the

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inventories did not contain all the company then owed. Suit was brought, which resulted in a verdict for the plaintiff for $2,000 and interest.

The questions involved in this appeal are grouped in appellants' brief as follows:

"*First.* That a verdict for the defendants should have been directed by the trial court.

"*Second.* That the trial court was in error in instructing the jury that they might find for defendants only in case the shortage approximated $2,000.

"*Third.* That the trial court erred in refusing to instruct the jury in regard to a voluntary payment with full knowledge of the facts, and in the instructions as to money had and received.

"*Fourth.* That statements of plaintiff's counsel were improper and prejudicial."

In discussing the first proposition, it is urged that the burden was upon the plaintiff to establish duress, and that a verdict should have been directed for the defendants, because plaintiff's proofs show that the matter was fully and fairly settled upon the advice of his own attorney and his relatives. Whether or not such threats were made became a question of fact for the jury to determine, and the trial judge, under careful instructions, submitted the question to them. It is urged that the plaintiff's proofs showed that the threats were made at the time of the execution of the note, and that no threats were made on the following day which induced its payment. Accepting plaintiff's testimony as true, that the threats were made, it appears that the threats were to prosecute unless the claimed shortages were paid. Having no money with him, he gave a note payable the following day. It was not necessary that the threats be again repeated if there was testimony to show that the undue pressure was not removed in the meantime. *Briggs* v. *Withey*, 24 Mich. 136; *Cribbs* v. *Sowle*, 87 Mich. 340 (49 N. W. 587, 24 Am. St. Rep. 166); *Bentley* v. *Robson*, 117 Mich. 691 (76 N. W. 146); *Knight* v.

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Brown, 137 Mich. 396 (100 N. W. 602); 22 Am. & Eng. Enc. Law (2d Ed.), p. 614.

The court charged the jury that they must not only find that the giving of the note was induced by threats of criminal prosecution, but its payment also. It cannot be said as a matter of law, under the facts in this case, that the jury were not warranted in finding that the undue pressure had not been removed. From the time of the giving of the note to the time of its payment plaintiff talked only with his wife, his brother-in-law, and his two brothers, who were farmers with no particular experience in business matters. He demanded the return of the note, which was refused. His conference with Mr. Boomhower certainly did not tend to allay his fears. When he was informed that, if defendants pressed the charge, a prison sentence was staring him in the face, he immediately paid his note. It is true that there must be continued existence of duress; but this question was properly submitted to the jury.

It is urged that the settlement of the attachment suit would be a good consideration for the payment of the plaintiff's note given the preceding evening. The record shows that the attachment suit was not discussed or mentioned between the parties as to its commencement or discontinuance, and the plaintiff heard of it only by accident while at Mr. Boomhower's office. It did not enter into the consideration of either of the notes.

Errors are assigned upon the instruction of the court in case the jury should find that Nelson was responsible for a shortage which did not approximate $2,000, providing the defendants made the claim in good faith. However, we do not consider it necessary to consider these alleged errors, because it is clear that the jury did not come to that phase of the case. It was the claim of the plaintiff that there was no indebtedness. Defendants claimed approximately

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$2,000 of indebtedness. The jury having rendered a verdict for the plaintiff for the full amount, they must have determined that there was no shortage, and could not have found it necessary to consider instructions by which they were to be governed in case they found a shortage less than the amount of the settlement. *MacKinnon Boiler, etc., Co.* v. *Land Co.*, 156 Mich. 11 (120 N. W. 26).

Under the charge of the court the plaintiff could only recover in case he proved, either that he was induced by duress to pay a debt he did not owe, or—

"If in the attempt to settle, defendants wrongfully and intentionally misrepresented the amount of the indebtedness, and plaintiff relied upon such statements of the defendants, and overpaid his indebtedness, he would be entitled to recover back the difference between his payments and the actual amount of his indebtedness."

The charge fairly presented the issues which were determined by the jury, and no error was committed in the failure to give defendants' request to charge as to voluntary payment.

We have examined the assignments of error as to the statements of counsel. When the statements complained of were called to the attention of the trial judge, he immediately, in the presence of the jury, corrected counsel. We find no prejudicial error in relation thereto.

The judgment is affirmed.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ., concurred.

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MOLIN *v.* WISCONSIN LAND & LUMBER CO.

1. EXPLOSIVES—GASOLINE—REGULATION—STATUTES.

Under Act No. 37, Pub. Acts 1909 (2 How. Stat. [2d Ed.] § 2598 *et seq.*), requiring gasoline, benzine, etc., to be kept in receptacles painted red and lettered with the name of the contents, the common law affords a remedy to an individual injured by violation thereof, although the law imposes only a penalty and creates no new remedy; where a duty is imposed by statute for the protection of individuals, the common law usually supplies a remedy if the statute gives none.[1]

2. SAME—NEGLIGENCE.

But where defendant permitted servants of a lumbering contractor to use its shop to warm their food and eat lunch, and to build a fire for such purpose, it was not liable because one of them poured gasoline from a can which was not painted or lettered as required by the statute, in order to start a fire, causing an explosion in which plaintiff was injured, in the absence of any averment that it was customary to use oil or kerosene in building fires, whereby defendant should have anticipated that they would search for and use its oil, and where plaintiff was a mere licensee on the premises and was not invited or permitted to use the oil.

Error to Menominee; Flannigan, J. Submitted June 20, 1913. (Docket No. 64.) Decided November 3, 1913.

Case by Victor Molin against the Wisconsin Land & Lumber Company for personal injuries. An order sustaining defendant's demurrer to the declaration is reviewed by plaintiff on writ of error. Affirmed.

Judd Yelland and *Cummiskey & Spencer*, for appellant.

F. D. Mead, for appellee.

OSTRANDER, J. The case made by the declaration

[1] As to regulating keeping or storing of explosives, see note in 41 L. R. A. (N. S.) 460.

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is briefly stated. Defendant owned a small building used as a blacksmith shop. Plaintiff with others, including one David Larson, was employed by Alfred Paulson to load forest products upon cars in the vicinity of the shop. Defendant permitted Paulson's men to use the shop for warming and eating dinner and to make a fire in a stove in the shop. Defendant kept and maintained in the shop, in a can, a quantity of gasoline, or benzine, or naphtha. There are three counts in the declaration, varied by alleging in one that the can contained gasoline, in another that it contained benzine, and in the third that it contained naphtha. Going into the shop on March 3, 1911, the plaintiff and Larson proceeded to build a fire in the stove, in doing which Larson poured some of the fluid from the can into the stove. The fluid was ignited by coals of fire which were in the stove, there was an explosion, and plaintiff was injured. The duty of defendant is alleged to be to keep the said gasoline (or benzine, or naphtha) in a receptacle painted red and stenciled gasoline (or benzine, or naphtha), as required by Act No. 37 of the Public Acts of 1909 (2 How. Stat. [2d Ed.] § 2598 *et seq.*), and the breach of duty alleged is that the fluid was kept in a can not labeled and not painted red. It is averred that, while plaintiff was in the exercise of due care, Larson, as the result of the negligence of defendant, procured the can and poured some of the fluid in the stove; "the said plaintiff not then and there knowing the contents of the said can to be gasoline" (or naphtha, or benzine) but supposing it to be kerosene oil. To the declaration defendant demurred for the reasons:

"(1) Because the declaration fails to allege any such state of facts or such active wrongdoing or wanton or gross negligence as make the defendant liable to the plaintiff under the license or permission granted by it to plaintiff's employer, Alfred Paulson,

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permitting his employees, including plaintiff, to enter and use the stove in the blacksmith shop of the defendant for the purpose therein mentioned.

"(2) Because it appears from said declaration that, at the time the accident occurred resulting in the injury to the plaintiff, the premises were not being used in accordance with the permission granted to Alfred Paulson, the employer of the plaintiff.

"(3) Because it appears from the declaration that the plaintiff was guilty of contributory negligence as a matter of law.

"(4) Because it appears from the declaration that the plaintiff did not belong to the class of persons which Act No. 37 of the Public Acts of 1909 (the violation of which by the defendant is charged to be negligence) is intended to protect.

"(5) Because it does not appear from the declaration that the defendant belongs to the class of persons who are required by said act to keep gasoline, naphtha, or benzine in the receptacles mentioned in said act and marked as provided therein.

"(6) Because it does not appear that the defendant violated said Act No. 37 of the Public Acts of 1909.

"(7) Because the failure to label the can containing gasoline, naphtha, or benzine was not the approximate cause of the injury.

"(8) Because under the facts as stated in the declaration the defendant owed no duty to the plaintiff to label said can in accordance with said statute.

"(9) Because it does not appear from the facts as stated in the declaration that the defendant was guilty of any negligence."

The demurrer was sustained and a judgment was entered that plaintiff take nothing by his suit and that defendant go thereof without day. It does not appear that any amendment of the declaration was or is desired.

The case cannot be disposed of on the second, third, fifth, or sixth grounds of demurrer. Fairly interpreted, the declaration charges defendant with a violation of the statute. The command of the statute is: "Every person purchasing gasoline, benzine or

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naphtha for use or sale at retail shall procure and keep the same only in barrels, casks, jugs, packages or cans painted and lettered as hereinbefore provided"—*i. e.*, in red cans having the word gasoline, or benzine, or naphtha, plainly lettered in English thereon. We must therefore consider the question which is raised by the other asserted grounds of demurrer.

The statute imposes a duty as a regulation of police, and it provides that, if the duty is neglected, a penalty, which may be a fine or imprisonment or both, may be imposed. It does not otherwise point out the consequences of its violation. The authorities recognize as a general rule that, where the duty imposed by a statute is manifestly intended for the protection and benefit of individuals, the common law, when an individual is injured by a breach of the duty, will supply a remedy if the statute gives none. See *Barfoot* v. *White Star Line,* 170 Mich. 349 (136 N. W. 437), and authorities cited in the opinion. The duty imposed by this statute is in fact calculated to protect, and we have no doubt was intended to protect, individuals.

It is said by appellant that the statute is intended for the protection of the public; that plaintiff "was rightfully upon the premises and, being a part of the whole public, was entitled to the protection of the statute." But a duty owing to everybody can never become the foundation of private action at law until some individual is placed in a position which gives him particular occasion to insist upon its performance; it then becomes a duty to him personally. Illustrating by the facts before us, whether defendant obeyed the statute was a matter of no personal consequence to plaintiff so long as he remained away from defendant's blacksmith shop or, being rightfully in the shop, so long as he did not use defendant's property to build a fire. Assuming that defend-

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ant violated the statute and that keeping the gasoline (or benzine, or naphtha) as it was kept was negligence *per se*, was plaintiff a person having the right to insist that the statute duty be performed—to insist that defendant owed him any duty?

In argument appellant seems to make the answer to this question depend somewhat upon what Larson did. Larson, it is averred, found the can and poured some of its contents into the stove; plaintiff supposing that what the can contained was kerosene oil. The enterprise of building a fire was a joint one, undertaken for the benefit of both Larson and the plaintiff, and involved, on the part of both, the use of defendant's oil. It is not a case where the can and its contents came rightfully into the hands of Larson for use. Both were on the premises of defendant by permission. Neither had been invited to use them, and neither of them had any business to transact with defendant there. The relation of each to the premises and to defendant was that of a licensee. Did defendant owe them the duty to see that his gasoline (or benzine, or naphtha) was kept in a red can? We think the answer must be "no" unless in giving permission to build a fire defendant ought to have considered that the men were likely to use his kerosene oil for that purpose and might suppose the can in question contained kerosene oil. The plaintiff has not averred a custom or practice in the locality or generally of starting fires in stoves with oil, by reason of which defendant ought reasonably to have anticipated that his licensees would search for his oil and use it to start a fire. We know of no general custom or practice to make such use of kerosene oil.

We conclude that the declaration alleges no duty owed by defendant to the plaintiff, and therefore affirm the judgment.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and BIRD, JJ., concurred.

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ASPLUND v. CALUMET & HECLA MINING CO.

1. MASTER AND SERVANT—TRIAL—CHARGE.

On the trial of an action for injuries sustained by a miner in defendant's employ, the court did not err in stating to the jury the claim of plaintiff in detail, in part as follows: That plaintiff claimed he was working in a stope with a partner; that the mine was working a day and night shift; that the plaintiff and another employee were running a drilling machine, and the rock was being excavated from between other strata of stone, which were known as the hanging wall and foot wall; that it was not part of plaintiff's duty to put in timbers and if they considered such work necessary to support the wall the men applied to the shift boss who was the proper person to cause the timbers to be put in by workmen employed for that purpose; that plaintiff called the attention of the shift boss to a point that looked dangerous and told the boss that plaintiff thought it ought to be timbered; that the place, in fact, needed support, and the boss who examined it told plaintiff he would send men to do it either that afternoon or the next day and directed plaintiff not to bar down any more rock from the place because they would make more descend; that on the following Monday when plaintiff went to work he again complained of the danger to the shift boss who informed him that he would have the place timbered as soon as possible and for plaintiff to go to work, he would be all right; the plaintiff relying on his promise and assurance, etc., the court also stating the claim of defendant and informing the jury that they were the sole judges of the facts. The charge was not improperly argumentative.

2. TRIAL—LEADING QUESTIONS.

No reversible error was committed in permitting his attorney to ask leading questions of the plaintiff who was a foreigner and understood English with difficulty. The ruling was a matter for the discretion of the trial court.

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3. MASTER AND SERVANT—MINES AND MINING.

Although a specified danger is patent and is known to the servant, the master may be liable for injuries resulting therefrom if he has lulled the servant into a sense of security by insisting that there was no danger, or promising to remedy it. And, accordingly, if the injured employee regarded the hanging wall as so dangerous that it needed timbering to make it safe, but did not regard the danger as so imminent as to justify him in disregarding the assurance and direction of his superior servant, he was entitled to recover.[1]

Error to Houghton; Cooper, J., presiding. Submitted June 20, 1913. (Docket No. 68.) Decided November 3, 1913.

Case by Victor Asplund against the Calumet & Hecla Mining Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Allen F. Rees, for appellant.

Le Gendre & Driscoil, for appellee.

MOORE, J. The plaintiff is a miner, and while at work in the Osceola lode of the defendant's mine he was injured by the falling of a considerable mass of rock. His thigh was broken, and he received other injuries. After plaintiff had put in all his evidence, defendant putting in no evidence, a directed verdict was requested on the part of the defendant. This request was denied. The case was submitted to a jury, which returned a substantial verdict in favor of the plaintiff. The case is brought here by writ of error.

[1] As to continuing work on master's promise to remove a specific cause of danger, see note in 40 L. R. A. 782.

The question of assurance of safety by master or coservant is treated in notes in 48 L. R. A. 542; 23 L. R. A. (N. S.) 1014; and 30 L. R. A. (N. S.) 453. And for effect of master's assurance as to obvious dangers of employment, see note in 4 L. R. A. (N. S.) 971.

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The errors assigned make it necessary to quote freely from the charge of the court, which we do as follows:

"The plaintiff claims that he was working as a miner in a stope with a partner. That the mine worked day and night shift, and plaintiff and his partner were running what is known as a drilling machine. That the copper rock in the mine was excavated from between other strata of stone or rock, the upper of which was known as the hanging wall, and the lower of which was known as the foot wall. The place where the copper rock was is known as the vein and is about nine feet wide. That the shift boss was in full charge of the underground workings of the mine. That the company had special gangs employed in the mine for the purpose of putting in timber wherever necessary, which gangs were known as the timbermen. That it is no part of the duty of the plaintiff or his partner to put in timbers, and the only thing they could do in case they deemed timber necessary or advisable in any place was to apply to and notify the shift boss, who was the proper person to apply to, and that it was the shift boss' duty, and he had authority from defendant, to cause timbers to be put in wherever necessary or advisable for the safety of the men, and that the shift boss is the proper person to whom to report any defects or inefficiencies or dangerous or unsafe place in the mine. * * *

"That, at the time of the occurrences of his injuries, the plaintiff was working in the first stope north of No. 15 shaft on the fourth level, at a place above about 30 feet up from the level, called the point. That, on Friday next prior to the day of his injuries, he and his partner were working in the upper stope in the level next to the first stope, above the place where he was working when injured, and were squaring this upper stope up and bringing it as far as the first stope. That this upper stope was just about finished and was holed to the third level; that is, a hole or opening had been made from this upper stope upward and through to the third level. That on this Friday they were told by the shift boss, under whose charge they were, that, when they finished the work of squaring up at the place they were, they were to

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go down and work at the point in the first stope. That on this upper stope below the place where they were working on Friday, but above the place where they would have to work when they went down to work in the first stope, was a belly of ground that did not look safe to the plaintiff, and the plaintiff on this Friday called the shift boss' attention to the same and told him he thought it ought to be timbered. That the place in fact did need timbering, and it was the defendant's duty, and the shift boss' duty as defendant's agent and representative, to see to it that it was timbered, and it could have been timbered with little cost and expense, and the danger of plaintiff's being injured by rock falling from it could have thus been obviated and avoided. That the shift boss examined the place and told the plaintiff that it needed timber and he would send the timbermen to timber it either that afternoon or the next day and told plaintiff and his partner, who had been barring down loose rock from this belly, not to bar down any more from it because they would make more fall. That this belly was not timbered on Friday afternoon, but the shift boss again examined it on the next day (Saturday), spending 10 or 15 minutes in examining it. That the plaintiff did not work in the mine from the Saturday evening quitting time (that is, 6 o'clock p. m.) until the following Monday night, when he and his partner went to work and went into this stope and found their drilling machine near the place where they had been working on Friday and Saturday (that is, the squaring up place) and found that the work of squaring up had been completed, and that, while they were gathering up their tools and waiting for him, the shift boss came and told plaintiff and his partner they would have to go down to the point (that is, to the place at the first stope whereat plaintiff was when injured). That the plaintiff again spoke to the shift boss and told him that this belly looked bad and asked him to have a look at it, and the shift boss thereupon told the plaintiff that the place was all right and that he (the shift boss), would have it timbered as soon as possible, or words to that effect, and told plaintiff to go on down to the point and go to work and that he would be all right; that nothing would fall from the belly.

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"That the plaintiff relied upon these promises and assurances from the shift boss and believed therefrom, and from the appearance of the belly, that he could safely work at the point until the place would be timbered, and because thereof, he went down to the point with his partner and went to work in a careful and prudent manner. That they set up their drilling machine and plaintiff was just starting a hole with a pick and had been working for a few minutes when a chunk of stone or rock from the belly fell therefrom and rolled down to the place where plaintiff was working (that is, to the point) and struck the machine and post and dragged them down the level and struck plaintiff and broke, crushing and injuring his leg and arm and internally injuring him, and ruptured him between his legs and otherwise injured him.

"Now, gentlemen, these are the claims of the plaintiff that because of these facts the defendant was guilty of negligence in conducting its business, and that because of such negligence the defendant ought to be held to compensate him for the injuries he received in the accident that occurred. The defendant, on the other hand, denies it was guilty in conducting its business, and denies the evidence shows it neglected any duty it owed the plaintiff, and alleges the fact that it carried on its business in a careful manner and did all the law requires, and denies that it should be held liable for the injuries that the plaintiff received. The defendant also claims that the plaintiff assumed the risk of working in the place where he did work, he having known that the ground in question was poor ground, and claims that under his evidence it was shown that he assumed whatever risk there was in his going to work at the place he was working when the accident happened. The defendant also claims that in any event he was guilty of contributory negligence in working as he did, under the circumstances he did, and that in any event they should not be held liable in this case. Now, gentlemen, that will be the question for you to determine. I might say in this case, as all others, you are the sole judges of the facts. I pass upon the law and you take the law as I give it to you. You take the law and apply it to the facts and find whether the

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plaintiff has maintained his cause of action by a fair preponderance of the evidence.

"I charge you that if the place where plaintiff was working at the time of the occurrence of his injuries was in an unsafe condition for him to work in by reason of the fact that rock was liable to fall or roll from the belly in question, and the belly could and should have been timbered by the defendant so as to prevent the falling or rolling of such rock, and the shift boss was a person to whom the defendant had intrusted the duty of looking after and timbering such place and causing the same to be timbered when necessary, and the plaintiff complained to the shift boss of the danger arising from the fact that the belly was untimbered and suggested or asked that the belly be timbered, and was asked, ordered, or directed by the shift boss to go to work at the place where he was injured, and if the plaintiff reasonably believed that he could work at such place mentioned with safety until these promises or assurances of the shift boss were fulfilled, then the plaintiff would be excused by the law in going to work and remaining at work at such place for a reasonable time thereafter to await the putting in of such timber, and he would not be deemed to have assumed the risk of injury by rock falling and striking him, owing to the want of such timber at such time, unless the danger was so imminent or glaring that a reasonably prudent man would not even after such promises and assurances and order or direction of the shift boss, incurred by entering and continuing the work as plaintiff did.
* * *

"I charge you further, a reasonable time for plaintiff to so work awaiting the fulfillment of an assurance or promise that the belly would be timbered would be such a period of time after the time of making the promise or assurance, or promises or assurances, that the same would be timbered, as would preclude a reasonable expectation on plaintiff's part that the promise might be kept, or, stated in another way, it would be the time which would elapse while the plaintiff was expecting the promise to be performed. If the plaintiff was in doubt as to the safety of the place where he was working at the time he was injured, and the plaintiff believed the shift boss knew

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better than he as to whether or not it was safe, and the shift boss assured plaintiff that the place was not unsafe, it would not be contributory negligence on plaintiff's part to be guided by the opinion and assurance of the shift boss. * * *

"The plaintiff was not guilty of contributory negligence if at the time of the occurrence of his injuries he was using and exercising ordinary care and prudence in performing his work, having regard for the situation in which he was working, and was conducting himself the same as a person of ordinary care and prudence would have conducted himself under the same or similar circumstances. He was only required to use and exercise ordinary care, and, if he did that, then he was not guilty of contributory negligence. If you find that the plaintiff knew or believed that the hanging wall was in a dangerous condition, and that in his judgment as a miner he knew or believed that the hanging was poor, as he expressed it, or if you find that from his experience, or from what the shift boss told him, or from his own observation or sounding, he believed or should have known that the hanging was likely to fall from the place where it did fall, even though he could not tell when it would fall, then I charge you that the risk of injury was one which he assumed, and your verdict must be for the defendant.

"If you find that the plaintiff knew or believed or had reason to know or believe that the hanging was liable to fall from where it did fall, and that nevertheless he went to work without objection under the place which he himself considered unsafe, even though he may not have known or believed that the rock would fall so soon, then plaintiff would be guilty of contributory negligence, and your verdict must be for the defendant. * * *

"It was the duty of the defendant to furnish plaintiff a reasonably safe place in which to do his work. I charge you that a person entering or going into a dangerous place assumes all risk of injury which an ordinarily careful and prudent person might apprehend is liable to happen under the circumstances. There is no liability for an injury inflicted upon one person by another, although the injured person be free from fault, if the cause of the injury be unusual

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and one which reasonable and careful foresight could not have foreseen and guarded against.

"In this case I charge you that the defendant is not an absolute insurer or guarantor of the safety of its employees. Its duty was only to exercise due care in this regard, such care as an ordinarily prudent person would exercise under like circumstances. If it exercised such care, then it cannot be held liable. In furnishing a safe place, the place is to be considered with reference to the nature of the employment. We recognize the fact that some employments in their very nature are more dangerous than others. The question in this case on this subject is: Did the defendant furnish the plaintiff a reasonably safe place in the mine?

"I charge you, gentlemen, the mere fact that an accident happened does not justify you in rendering a verdict against the defendant. That is not sufficient. The plaintiff must show to your satisfaction, by a fair preponderance of the evidence, that the accident happened, and that it was the result of negligence on the part of the defendant. He must show still further that he himself was not guilty of any negligence which contributed to the accident in the slightest degree. If he was guilty of any such negligence, then he would be guilty of contributory negligence, and that would bar him from recovering. Therefore, gentlemen, it is necessary that the plaintiff prove to your satisfaction, by a fair preponderance of the evidence, that this accident happened as a result of the negligence of the defendant, and that he himself was free from any negligence which contributed to the accident (that is, any negligence which contributed in the slightest degree to the accident) before he is entitled to recover at your hands. * * *

"I charge you further that the plaintiff, in the discharge of his work as a miner, is obliged to exercise care for his own safety. If he failed to do so and any negligence on his part contributed in the slightest degree to his injuries, he would be guilty of contributory negligence, and that would bar plaintiff's right to recover, even if the defendant itself was guilty of negligence."

There was much more of the charge, but we have

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quoted all of that part of it to which objection is made.

Complaint is made of various portions of this charge and particularly to that part relating to the claim of the plaintiff. Counsel say:

"This portion of the charge reads very much as if it were based upon a request submitted by the plaintiff. Taking these claims as stated by the court, as they read in the portions of the charge covered by the assignments of error, and even more strongly if read in sequence as they occur in the charge, they are distinctly in the nature of an argument in favor of the plaintiff, and our main objection to it is that it is argumentative. This is quite likely to be the case where it is attempted to state, as in this charge, the claims of the plaintiff with regard to the facts in detail."

A careful reading of the charge does not satisfy us the criticism is justified. The judge undertook to state the claims of each of the parties. Perhaps the charge states them more in detail than was necessary, but the judge was careful to say to the jury:

"I might say in this case, as in all others, you are the sole judges of the facts. I pass upon the law and you take the law as I give it to you. You take the law and apply it to the facts and find whether the plaintiff has maintained his cause of action by a fair preponderance of the evidence. * * * You are the judges of the weight of the evidence. You will give the evidence such weight as in your judgment you feel it is entitled to, and if, after doing so, you feel that the plaintiff has established his case by a fair preponderance of the evidence, then you will find a judgment in favor of the plaintiff. * * * If, on the other hand, the plaintiff has not maintained his cause of action by a fair preponderance of the evidence, then proceed to render a verdict in favor of the defendant, and in that case the form of your verdict will be, 'We find for the defendant.' "

Errors are assigned on the admission of testimony

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in relation to what was said and done by Capt. Innes, who plaintiff claims was the boss of the underground workings. We again quote from the brief:

"The objections were overruled and the witness gave the answers which have been heretofore quoted in this brief.

"In the case of *Toomey* v. *Steel Works*, 89 Mich. 249 [50 N. W. 850], this court held as follows with reference to testimony of a similar nature:

"'The failure of plaintiff to produce such proof of negligence is not excused by showing that the foreman assured him that the frame was properly secured. Even if the foreman were the defendant's vice principal, he could not bind the defendant by such a statement, if the danger was as apparent to plaintiff as to him. * * * An agent is not by the law clothed with power to make such representations, and bind his principal to respond in damages if injury results.'

"On this principle thus laid down by this court the testimony of the plaintiff in this regard was incompetent and the objection should have been sustained."

We shall have occasion to consider later the principle of law thus invoked.

Counsel say the court erred in permitting leading questions, citing:

"You may state whether or not you believed you could work there safely until it was timbered.

"You may state whether or not, after the shift boss told you that nothing could fall and to go down there and that he would timber it, you believed you could work safely down there until it was timbered.

"After having been sent down to the point by the shift boss on Monday, did you think that belly would come down on you?"

—and says they are examples of numerous infractions of the rule. The record indicates the plaintiff was not well versed in the English language and part of the time his testimony was given through an interpreter.

We do not think it can be said the court abused the

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discretion possessed by him in regard to permitting leading questions. See *Mason* v. *Patrick,* 100 Mich. 577 (59 N. W. 239); *Lungerhausen* v. *Crittenden,* 103 Mich. 173 (61 N. W. 270); *Webb* v. *Feather's Estate,* 119 Mich. 473 (78 N. W. 550); *Burnham* v. *Insurance Co.,* 119 Mich. 588 (78 N. W. 653); *Burnham* v. *Insurance Co.,* 120 Mich. 499 (79 N. W. 1124).

We now come to the important question in the case. It is stated by counsel as follows:

"A verdict should have been directed in favor of the defendant upon the evidence given by the plaintiff, which was the only evidence in the case relating to the circumstances of the accident. While there are other errors which occurred on the trial, upon which defendant relies for a reversal of the judgment in favor of the plaintiff, the main question to be submitted to this court is whether, upon the evidence of plaintiff himself, any cause of action was established which would entitle the plaintiff to recover damages against the defendant. It is of course conceded that the evidence in the case must be viewed in its most favorable aspect to the plaintiff. * * *

"(1) The plaintiff, having full knowledge of the situation and of the danger existing, assumed the risk of injury when, without protest, he went to work under the belly on the night of the accident.

"(2) The plaintiff was guilty of contributory negligence because, without protest, he went to work on the night of the accident with full knowledge of the existing conditions and with full appreciation of the danger therefrom.

"(3) Because there is not sufficient evidence to charge the defendant with negligence with respect to plaintiff, having in view his position and duties in the mine."

In support of his contention, counsel cite 26 Cyc. pp. 1209 to 1213, *Toomey* v. *Steel Works,* 89 Mich. 249 (50 N. W. 850), and other authorities.

It is manifest that, to pass intelligently upon the propositions of counsel thus stated, it is necessary to

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quote somewhat fully from the material parts of the testimony of the plaintiff, which we do as follows:

"I had worked in this same stope six months and a half altogether. This belly had been in sight where we could see it about a month. We took the ground out from under that belly, me and my partners, and the other shift men also. We had worked beyond that until we got up in the arch. I don't remember positively if it was about a month before we were hurt that the ground under that belly was taken out, but it was at least a month. After we had taken the rock away from under we suspect it was dangerous. We thought for a whole month and perhaps more that the belly was dangerous ground. We tried to take it down, to pinch it down. We couldn't do it. We still considered it dangerous for that whole month. * * * What made me think that belly was dangerous I have sounded with the bar. It gives a dangerous sound. It sounds to us. It did sound that showed it was dangerous. We got that sound that indicated it was dangerous a month or more before I got hurt. We suspect it. We thought it was dangerous. We thought it was going to come down some day. The part of the belly that was so dangerous as I remember, and I thought was going to come down, was about the middle. I didn't think that any part of it would come down. It meant that the whole of it might come down. I don't remember how often we used to sound it, whether we would sound it more than just that one time. It was within a month's time before I was hurt. The shift boss sounded it Friday before I was hurt. We sounded it the same time. I held the lamp and I think that the shift boss had the lamp on his hat also. I sounded it myself. We thought it was dangerous the way it sounded, but the shift boss told us it wasn't dangerous so we believed him. My partner and myself thought. Ristvedt thought it was dangerous too. It sounded dangerous to me. That was on Friday. I had not sounded it between the time, a month before that, and that Friday that I remember. The reason we didn't sound it was we thought it will stay up there.

"*Q.* Now let me understand that. When you

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sounded it a month or more, or about a month before you were hurt, you thought it was dangerous and was likely to come down at any time. That's what you told me, didn't you?

"*A.* We didn't sound it.

"*Q.* Didn't you sound the hanging, that hanging, that belly, a month before you were hurt, or about a month?

"*A.* We sound it elsewhere.

"*Q.* Didn't you tell me a little while ago you sounded that belly?

"*A.* We didn't sound the belly but we sounded other places on the belly.

"*Q.* That would be to find out whether the belly was solid or not?

"*A.* Yes.

"*Q.* And in that way you found out that the middle of the belly was bad?

"*A.* Yes.

"*Q.* Now, having found it bad a month before, I ask you again if you didn't sound some more between that time and the time you were hurt?

"*A.* I don't remember.

"*Q.* But all that time you thought it was going to come down some day?

"*A.* We thought so.

"*Q.* By 'we,' whom do you mean?

"*A.* My partner and myself.

"*Q.* You both thought the same?

"*A.* Yes. We didn't think that all the time from the time the belly was first exposed. Sometimes we thought of it. When we did think of it we thought it was unsafe, dangerous, and was going to come down some day. We gave notice to the opposite shift that the hanging looks poor. We told them at the belly. I don't remember how long before we were hurt that I gave notice to the opposite shift that the place was dangerous, but we had some talk some time. It was some time in that month from the time the belly was exposed up to the time I was hurt. I don't know if it was two or three weeks before I was hurt. I don't remember if it was before the Friday that I told about. I don't remember more than one time giving them notice that the belly was dangerous. We told them so they knew how to look out for them-

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selves. That was because we thought it was dangerous and was going to come down. My recollection is that my partner wrote a letter, a short letter, and left it down in the mine on a powder box, stating, 'Look out, the hanging is dangerous.' That powder box was on the third level. It was in the level, not in the stope. That was about 300 feet in from the shaft. It was pretty near in to this stope. My partner wrote that letter in English. It said, 'The hanging looks poor; look out for it.' It was a part of the same belly. He said that in his letter. I recollect that he did say. It seems to me that it was the right thing to do to get up that letter. That's what I thought at that time. I thought that because I really believed that the belly was dangerous and was going to come down if we didn't look out for it. That's just what I mean. It's so long time passed since that happened that I can't tell about how long that was before I got hurt, but it seems to me that it was during that month. * * * We went up through that hole to get to the third. By through that hole I mean the hole to the north of where we were working. This other hole that I told about was almost to the corner which we squared up. About 15 feet from that corner north. We made that hole Friday before dinner. Previous to that the dry hole was drilled in there. He put the hole through then the Friday morning. The shift boss, when he came down, he told us to put one hole in there and blast before dinner, so as to make the opening through. He said it would be good to put the timbers through that into the belly that was in the stope. The hole was for that. That was what it was for. That hole was about three feet long. The men could go through all right. Just about big enough for a man to go through. By timbers for that belly I mean for this same belly that we have been talking about. The shift boss says it was poor and he says that he was going to put timbers in there, four timbers. That was Friday when he said that. We thought it was poor because he also said it was poor. We knew it was going to come down some day. We thought so Friday, because he says that it was to be timbered. We thought so before Friday. We didn't know that it was dangerous before we were told; we more or less thought so; but when he said it himself

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that it was so we believed him for the reason that he had been working in the mine for 20 years. We thought after he said it was poor we were even more sure that it was going to come down. We were even more sure after he said it was poor than we were before. We thought it was good ground, but we have a right whenever there is a poor place, or we think the place is poor, to notify the shift boss, call his attention to it, so that he will fix it up. We didn't have so much experience as the shift boss, and we had a right to tell him about it, and we did tell him about it one month or more before I was hurt, we thought that was poor ground. That was my judgment as a miner, and my partner's judgment. We didn't speak to Capt. Innes about it until Friday before the accident. We thought he knew that himself. It didn't look so very bad, but appeared somewhat bad. We thought he would see it; that's the reason we didn't tell him because it looked so bad we thought he would see it himself, and he knew more than we did.

"*Q.* Now, won't you answer my question directly, without telling what you thought Capt. Innes knew, or anything about it? I will repeat the question and ask you to answer it without talking about Capt. Innes. You and Ristvedt thought it looked so bad that you felt sure the captain would see it without you telling him?

"*A.* We thought so.

"*Q.* And that's the reason you didn't tell him?

"*A.* Yes, that's the reason. The first time it was spoken about between us and Capt. Innes was Friday before the accident. He did see that Friday morning, and he asked me, 'How is that hanging?' and I told him, 'It looks poor.' The way I said it in English to Capt. Innes was: He said, 'How that belly over there, that belly look?' I said, 'That look kind of poor,' I said—and he went to look. He take the bar; he try that. He said, 'That look poor.' When he tried it with the bar I thought it was poor. It sounded poor to me, and he said that poor. That was Friday morning. Saturday I said I didn't sound it. We thought all day Saturday that it was poor. * * *"

On the redirect examination he testified:

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"The night of my injury we had been working in the upper stope there an hour and a half altogether. Previous to that night we had been working in the upper stope three months and a half. The day of my injury this belly I have mentioned had been undermined about a month. After the rock was taken out from that belly we worked above the belly up to that Monday evening. That is the Monday evening of my injury. During that time in going to my work we were going by the third level through that hole. When we went that way to my work we would not be required to walk under the belly. The working place was above this belly. * * *

"*Q.* After having been sent down to the point by the shift boss on Monday, did you think that the belly would come down on you?

"*A.* No."

On the recross-examination he testified:

"Monday night we sounded the belly before Capt. Innes came. It sound poor to us. By that I mean the sound we got by hitting it with the bar. We thought it was what we call poor ground, poor hanging. When we had this talk with the trammers the trammers were in the stope then. It was before we talked with the trammers that we did this sounding. When we talked with the trammers and told them that the ground was poor and they said they could see it was poor, we had already sounded it. That was about 8 o'clock Monday night. We went underground Monday night at 7 o'clock, leave surface at a few minutes to 7, and get down to our work at 7. It was near 8 o'clock that Capt. Innes came. I don't remember just the time. It was after we had talked with the trammers. Capt. Innes was on the third level. He talked to us from that hole. But he stayed up on the third level and just talked to us down through the hole. He was kneeling down partly looking down through the hole and talking to us. He would be six feet up from us. * * *"

In addition to the authorities already mentioned, counsel say:

"The principle with reference to the effect of a

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promise of the employer to remedy the defect is thus stated in [4] Thompson on Negligence, § 4666:

"'On the other hand, the employee is deemed to accept the risk, notwithstanding the promise of the employer to repair the defect, (1) where the danger is great, obvious, and immediate —such as a reasonably prudent man would not encounter.'

"A number of cases are cited in the margin and we have failed to see anything which raises any doubt as to the proposition in any jurisdiction."

In construing the testimony of the plaintiff it should not be forgotten that, for a month after the removal of the pillar under the belly, plaintiff was at work above this point, where he would not have been injured had the rock fallen. While he thought it dangerous and so notified Capt. Innes, still the rock had not fallen, and it was not until he had been assured by the captain that he went to work where the injury occurred.

In *Brouseau* v. *Supply Co.*, 158 Mich. 312 (122 N. W. 620, 27 L. R. A. [N. S.] 1052), it is said in part:

"If the employee, after notifying the employer of a dangerous defect, is induced to continue his work by the employer's promise to remove the defect, his implied contract to assume the risk of such defect is suspended for a reasonable time, and the employer impliedly contracts to assume the risk of injury therefrom himself. Regarding the employer's promise to repair as a temporary assumption of the risk on his part, it appears to us illogical to hold that the employee is no longer charged with the *obvious* risks of a complicated machine, but still assumes the *obvious* risks of a simple implement. We deem it more in accordance with the principle upon which the doctrine of assumed risk rests in this State to hold that it applies alike to simple tools and complicated machinery. See 1 Labatt on Master and Servant, pp. 1223, 1224; *Louisville Hotel Co.* v. *Kaltenbrun*, 26 Ky. Law Rep. 208, 669 (80 S. W. 1163, 82 S. W. 378); *Roux* v. *Lumber Co.*, 85 Mich. 519 (48 N. W. 1092, 13 L. R. A. 728, 24 Am. St. Rep. 102); *Lyttle* v. *Rail-*

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way Co., 84 Mich. 289 (47 N. W. 571); *Brown* v. *Lennane*, 155 Mich. 686 (118 N. W. 581 [30 L. R. A. (N. S.) 453].

"We do not think it should be held, as a matter of law, that the directions of the master's representative did not amount to a promise to repair, upon which the plaintiff had a right to rely. Neither can it be affirmed, as a matter of law, that plaintiff was guilty of contributory negligence without entirely depriving him of the protection afforded by the master's temporary assumption of the risk. It is clear that, if the mere use of the dull tongs under the surrounding circumstances of peril constituted contributory negligence, the rule absolving plaintiff from the assumption of the risk which his employer had agreed to assume for the time being would be wholly valueless, since the rule only applies where the danger is not so imminent that an ordinarily prudent man would not assume the risk itself. *Mann* v. *Railway Co.*, 124 Mich. 641 (83 N. W. 596).

"If plaintiff was guilty of contributory negligence, therefore, it was because he went on using the dull tongs which the employer requested him to continue using. According to his testimony, he used them with proper care, in reliance upon the orders and promises of his employer.

"The plaintiff, 'it may reasonably be assumed, would to some extent have his fears allayed by the commands of a master, whose duty it would be not to send him into danger, and who might therefore be supposed to know, when he gave the command, that the dangers were not such or so great as the servant had apprehended. * * * Moreover, the assurances remove all ground for the argument that the servant, by continuing the employment, engages to assume its risks. So far as the particular peril is concerned, the implication of law is rebutted by the giving and accepting of the assurance; for nothing is plainer or more reasonable than that the parties may and should where practicable come to an understanding between themselves regarding matters of this nature.' Cooley on Torts, pp. 556, 559, quoted with approval in *Roux* v. *Lumber Co.*, *supra*.

"It is difficult to believe that any employer would induce an employee to continue a service which he

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believed would probably result in his serious injury. It is obvious that the plaintiff believed that, notwithstanding the apparent danger, he could escape injury in continuing his work. He had used the tongs without injurious results from their slipping up to the time of his injury. * * *

"In the light of the testimony as to the results attending the use of the tongs before and after the plaintiff's injuries, I do not think that it should be determined, as a matter of law, that the danger was so imminent and great that it was sheer recklessness on the part of the plaintiff to obey the directions of his employer, relying upon his assurances.

"The judgment is reversed, and a new trial granted."

The language used in *Runians* v. *Keller & Brady Co.*, 141 Ky. 827 (133 S. W. 960), is germane here:

"This is a case in which the master and servant both knew that the roof had not been scaled, and wherein the master, in the presence of the servant, examined the roof, assured the servant that it was safe, and directed him to remove the *debris* before scaling the wall so that an approaching train might pass. The general rule is that when a master directs an employee to enter a dangerous place to labor and the employee complies with that order and is injured, he can recover from the master, unless the danger was so obvious and imminent that an ordinarily prudent person would not have undertaken the work, even though ordered by his master to do so. This is a question for the jury to determine. *I. C. R. Co.* v. *Edmonds*, 33 Ky. Law Rep. 933 (111 S. W. 331). In the case of *Pullman Co.* v. *Geller*, 128 Ky. 72 (107 S. W. 271, 32 Ky. Law Rep. 884, 129 Am. St. Rep. 295), this court, in speaking of the rule that obtains when a servant of his own volition enters a place to work knowing the danger, said:

"'This rule must, however, be applied with some modification, if the work is done in an emergency and by the direction of the master, or by his express command in the absence of an emergency, and the master gives the servant to understand that he does not consider the risk one which a prudent man would refuse to undertake, in such event the servant, notwith-

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standing his knowledge of the danger, has a right to rely on his master's judgment, unless his own is so clearly opposed thereto, that, in fact, he does not rely upon the master's opinion.' * * *

"In the case of *Stephens* v. *Railway Co.*, [96 Mo. 212] 9 S. W. 591 (9 Am. St. Rep. 336), the court said:

"'So, too, where the danger is patent and is known to the servant, the master may be liable for injuries resulting therefrom, as where he has lulled the servant into a sense of security by insisting there is no danger or has promised to remove the defect. Wood on Master and Servant, § 352. And, more to the point in this case, a recent text-book uses this language: "If, therefore, the master orders the servant into a situation of danger, and he obeys, and is thereby injured, the law will not deny him a remedy against the master on the ground of contributory negligence, unless the danger was so glaring, that no prudent man would have entered into it, even where, like the servant, he was not entirely free to choose."' * * *

"The Nebraska court, in the case of *Chicago, etc., R. Co.* v. *McCarty*, 49 Neb. 475 (68 N. W. 663), announced the rule, which is a reasonable one, to be as follows:

"'Our conclusion after a consideration of the subject is, that it is a harsh and unreasonable rule which charges a servant, when commanded to perform an act by his master, with the duty of at once determining whether or not the act can be safely performed, and then performing it at his peril, or refusing to perform it at the expense of losing his employment. The risk incurred by obeying a negligent command of the master is not one ordinarily incident to the servant's employment, and is not an assumed risk, because negligence on the part of the master is not presumed to be a feature of the employment. * * *'

"In Shearman & Redfield on Negligence, § 186, we find the following:

"'The true rule in this, as in all other cases, is that, if the master gives the servant to understand that he does not consider the risk one which a prudent person would refuse to undertake, the servant has a right to rely upon his master's judgment unless his own is so clearly opposed thereto that, in

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fact, he does not rely upon the master's opinion. So, if the peculiar risk of the act commanded by the master is not obvious, the servant has a right to assume that he is not sent into any unusual peril, and he is not bound to investigate into the risk, before obeying his orders. A servant is not called upon to set up his unaided judgment against that of his superiors; and he may rely upon their advice and still more upon their orders, notwithstanding many misgivings of his own. If the master directs the servant to do some act which is dangerous, but which could be made less dangerous by the use of special care on the part of the master, the servant has a right to assume that such special care will be taken, and does not take the greater risk upon himself. If the master calls suddenly upon the servant under circumstances which give no time for consideration, * * * he is bound to indemnify the servant for injuries sustained through obedience to such a call. The servant's dependent and inferior position is to be taken into consideration; and if the master gives him positive orders to go on with the work, under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not obviously so dangerous that no man of ordinary prudence would have obeyed.'"

Many other authorities to the like effect may be found in the brief. In the instant case it is a fair inference from the testimony that, while the plaintiff regarded the hanging wall as so dangerous as to need timbering to make it safe, he did not regard the danger as so immediate as to justify him in disregarding the assurance and the direction of his superior. The questions presented by the record could not properly be withdrawn from the jury.

Judgment is affirmed.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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FELDKAMP *v.* ERNST.

1. WATERS AND WATERCOURSES—OBSTRUCTION—SURFACE WATERS.
In a suit to enjoin the maintenance of a dam on premises of the defendant, resulting in turning on to complainant's property water which had previously crossed over defendant's land, thereby increasing the volume of water which flooded complainant, evidence, although in conflict, sufficiently sustaining complainant's contention that the dam turned all the water away from defendant's lands that they would naturally receive, and that defendant's obstruction caused the same to flow across complainant's property, warranted a decree granting the injunction.

2. ELECTION OF REMEDIES—WATERS AND WATERCOURSES—INCONSISTENT CLAIMS—ESTOPPEL—DAMAGES—CONTINUING TRESPASS.
The commencement of an action at law for flooding complainant's lands, where no declaration was filed, did not bar complainant's right to obtain an injunction; for complainant might have pursued his legal remedy to recover such damages as he had sustained up to the time of commencing his action and a judgment would not have barred a subsequent action at law. The remedies at law and in equity were not so inconsistent as to warrant an application of the rule of election.

3. JUDGMENT — ESTOPPEL — PARTIES — INJUNCTION — WATERS AND WATERCOURSES—DAM.
The fact that complainant, who asked for an injunction to compel the removal of a dam, had been a witness for another injured party in an action at law for damages, did not preclude his right to equitable relief, although, by stipulation, prospective damages had been recovered by the plaintiff in the cause, wherein complainant was not, however, made a party. Nor did the fact that complainant had agreed that if the case were lost, he would pay part of the expense, prevent him from seeking the right to an injunction.

Appeal from Washtenaw; Kinne, J. Submitted

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June 20, 1913. (Docket No. 70.) Decided November 3, 1913. Rehearing denied January 5, 1914.

Bill by George J. Feldkamp against Christian Ernst for an injunction. From a decree for complainant, defendant appeals. Affirmed.

Frank A. Stivers, for complainant.

A. J. Waters, for defendant.

BROOKE, J. The bill of complaint in this cause is filed for the purpose of securing a mandatory injunction, compelling defendant to remove an artificial dam built upon his own lands, it being alleged that the purpose and effect of said dam is to deflect the natural course of surface waters, thus casting them upon the lands of one Finkbinder, and thence upon the premises of complainant.

A map introduced by defendant, the accuracy of which is questioned by complainant, will yet serve to indicate the relative positions of the several properties involved and the elevation of the lands in a general way. For convenient reference we publish it herewith.

A glance at the map will indicate that the lands of defendant, as well as those of Hotrum and Finkbinder, slope towards the north. The surface waters collecting upon the southerly portion of all the properties is finally collected through natural ways upon the northwest corner of Hotrum's lands, immediately east of defendant's line and south of Finkbinder's. At that point the ground seems to be practically level. To drain this area, Hotrum, some time prior to the year 1898 (probably 1894), ran a double plow furrow, indicated on the map as "Hotrum Ditch." This furrow did not extend north to the line between Hotrum and Finkbinder, and, it is claimed by complainant, did not in the slightest degree change the natural

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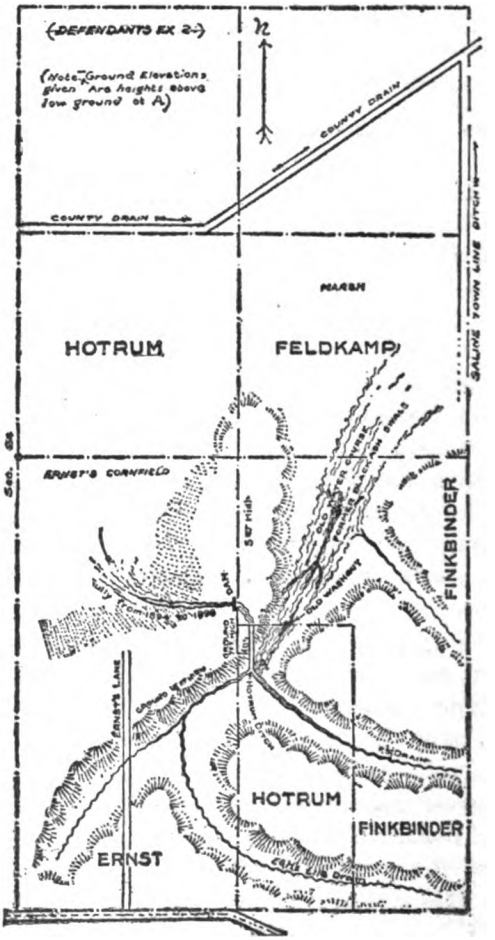
course of the surface waters. Defendant insists, however, that after Hotrum made the ditch in question the waters were diverted in a northwesterly direction upon his lands, instead of going, as formerly,



in a northeasterly direction upon and across the lands of Finkbinder and onto complainant's lands. Defendant therefore in 1898 built the dam in question. It is variously described in the record as a structure

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from 12 to 50 feet in length and from 2½ to 5 feet in height. Some time after the completion of the dam Finkbinder commenced a suit at law against defendant Ernst for the recovery of damages growing out of the alleged wrongful diversion of the waters by means of the dam. Upon the first trial of this suit Finkbinder recovered a judgment against Ernst, which was reversed in this court because of erroneous instructions to the jury. *Finkbinder* v. *Ernst*, 126 Mich. 565 (85 N. W. 1127). A second trial again resulted in a judgment against defendant Ernst in the sum of $175. This judgment against defendant Ernst was affirmed by this court (*Finkbinder* v. *Ernst*, 135 Mich. 226 [97 N. W. 684, 100 N. W. 180]) in June, 1904. While this litigation was in progress complainant herein had also commenced a suit at law against Ernst, which was not prosecuted, and was finally terminated by a default judgment against complainant. After the termination of the Finkbinder litigation complainant demanded that Ernst remove the dam. This being refused, he filed his bill of complaint in September, 1905. Upon the hearing, which did not occur until 1912, each party to the controversy swore 14 witnesses. These witnesses were examined, cross-examined, and re-examined at great length by able counsel upon both sides. The record is further augmented by the introduction of certain evidence taken in the law case of *Finkbinder* v. *Ernst*.

The learned circuit judge who tried the case, and who, from his long residence and official activity in the county in which it arose, may be supposed to have had a more or less valuable acquaintance with the witnesses, and who furthermore had the advantage of noting the manner in which each witness gave his testimony, filed the following opinion:

"To my mind this case is not free from doubt. It is evident that both parties hereto earnestly believe

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that each is right. If it did not involve so great expense I should be disposed to summon a jury who might give their verdict upon the testimony presented, but this course is not practicable. The subject-matter of this litigation, although between other complainants, has been twice before this court and twice in the Supreme Court. A large amount of time and money has been consumed in this controversy. I find it impossible to divide this responsibility, or its burdens, between the parties thereto. Apparently the one must win and the other lose. The defendant has raised and argued certain propositions of law intended as a bar to this suit, which do not seem to me to be applicable to the facts in this case.

"I think the case should be disposed of upon the merits as presented by the evidence, and herein lies the serious trouble. Men of high standing and excellent reputation in their communities have been arrayed against each other in the giving of their testimony. The only explanation that I can find of this fact must lie in the very nature of the subject-matter of this litigation. It is evident that the memories of those witnesses, and the impressions which they now may form respecting the situation of these premises, differ radically. At the request of counsel, I, in their company, inspected these premises, with no other result than the conviction that I must depend on the testimony of the witnesses.

"I know of no standard whereby these impressions may be measured with any certain accuracy. It has seemed to me that the importance of this matter to either party hereto has been greatly exaggerated. I think it would be difficult and perhaps unjust not to regard the two verdicts which have already been rendered in this matter as having at least some important instruction, although not necessarily binding upon the parties to this cause. The respective counsel in this case have done all in their power to aid me to a right conclusion, and especially Mr. Waters, counsel for defendant, could not have done more if the case had been his own.

"My conclusion in this matter is that the defendant made a mistake when he erected this dam, and that it ought to be removed. I do not think that its loss or removal will cause any serious loss or inconven-

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ience to the defendant. I think that the costs to the complainant should not exceed the sum of $50. A decree may be made in correspondence to this opinion."

We have read the entire record with care; and, while the case is not free from doubt (no case can be free from doubt in the face of such conflicting evidence), we have reached the conclusion that the complainant established the following facts by a fair preponderance of the evidence:

(1) From the earliest period mentioned in the record, in times of high water, the water went, in part at least, over defendant's lands to the northwest; (2) that the water had flowed in a much greater measure over defendant's lands for two or three years prior to 1894, in which year Hotrum made his ditch; (3) that in making the ditch, Hotrum did not change the course of the water as it then ran; (4) that through the erection of the dam in question in 1898 defendant turned all of the water away from his lands, some of which they had received from the earliest times, and much, if not all, of which he had, through natural causes, been burdened with for some seven years.

We are quite aware that there is plenty of evidence in the record contradicting point-blank each of the foregoing propositions, but the evidence in favor of them we think preponderates. While the fact that two juries have found the dam to be an unlawful structure, and have assessed damages against defendant on account of its maintenance, has no direct bearing upon the question, it nevertheless tends to indicate that the testimony seems to affect all unprejudiced minds in a similar manner. The conclusions, too, of the learned circuit judge, who has three times gone over this vexed question, should not be, and are not, without weight. While the cause is tried in this court *de novo*, due consideration should always be given to the opinion of the court below upon questions of fact. The reasons for doing so in this case

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are, as pointed out, much stronger than is usual. Upon the merits, then, we find ourselves in agreement with the findings of the circuit judge.

But it is urged on behalf of defendant that complainant cannot succeed in a court of equity because, having commenced a suit at law, for damages growing out of the erection of the dam in question, he should be held to have elected his remedy—a remedy inconsistent with the one he now seeks. Are the two remedies inconsistent? We think not. No declaration was filed in the suit at law, a summons only was served. Complainant in this cause (plaintiff there) certainly had a right to pursue his legal remedy against defendant for the recovery of damages he had sustained up to that time. Had he recovered a judgment for such damages, it would have been no bar to a second or third legal action for subsequently accruing damages. Nor would such a judgment have prevented him from seeking the aid of a court of equity to secure the abatement of the dam if defendant persisted in maintaining it.

Defendant further contends that complainant should be held to be estopped from prosecuting this action for the following reasons: In the case of *Finkbinder* v. *Ernst* by stipulation of counsel it was agreed that the damages were claimed on account of *permanent* injury to the soil, and upon the theory that the dam was to remain. In that case complainant was a witness, and had agreed with Finkbinder that if the case were lost he (complainant) would pay some portion of the expense. It further appears that the gentlemen who represented Finkbinder in his suit now appear as solicitors for complainant. From these facts counsel for defendant argues that, having aided Finkbinder in securing a judgment upon the theory that the dam was to be permanent, complainant should not now be permitted to seek its abatement. It is not shown that complainant had any con-

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trol of the theory upon which *Finkbinder's Case* was tried, nor that he had any interest in the judgment. He was interested in establishing the illegality of the structure, and, having such interest, we can see no impropriety in his having agreed, in case of loss, to share the costs with Finkbinder. He was not a party to the suit, and was in no wise bound by the judgment.

It is said by counsel for defendant that in this case injunctive relief should be denied because to grant it would cause much greater hardship and damage to defendant than its denial would cause to complainant. We do not think this fact very clearly appears in the record, and the court below, after a personal examination of the premises, was of the opinion that the removal of the dam would not cause any serious loss or inconvenience to defendant.

In their zeal for the interests of their respective clients counsel for both parties have in their briefs permitted themselves the use of language acrimonious, if not abusive. While due allowance must be made for partisanship, it should not be forgotten that the administration of justice is never aided by the substitution of invective for argument.

The decree of the court below is affirmed.

STEERE, C. J., and MOORE, MCALVAY, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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PRATT *v.* ALLEGAN CIRCUIT JUDGE.

1. FRAUD—PROCESS—AFFIDAVIT FOR CAPIAS—OPINIONS—VALUE.
   The rule that a seller has the right to praise his property and to give his opinion concerning its value cannot be extended to warrant false representations as to value and selling qualities, which may be relied on by the purchaser and operate as an inducement to the deal.[1]

2. SAME—VENDOR AND PURCHASER—OPINION—ARREST.
   The representation that property will readily sell in the market at a stated price is a representation of fact, and, if relied upon, may be treated as the basis of an action for fraud: an affidavit for capias charging such misrepresentation is not defective on the ground that it sets up statements that constituted mere "seller's talk."

3. ARREST—PROCESS—AFFIDAVIT—CAPIAS AD RESPONDENDUM.
   An affidavit for a capias charging defendant with false representations relative to the value and selling properties of certain real estate was not defective because it did not set forth the fact that the deponent was possessed of knowledge sufficient to render him competent to state his opinion as to its value, where the affidavit averred that affiant had personal knowledge of the facts stated: no question of expert knowledge was involved; any citizen familiar with values might testify or give his opinion.

4. SAME—PROCESS—CAPIAS.
   Where the fact stated in the affidavit is one about which testimony of any person having means of knowledge would be admissible, the affiant need not set forth the source and extent of his knowledge if it contains the general averment that he has personal knowledge of the facts or circumstances stated.

Mandamus by Ernest E. Pratt and another against

[1] On the question whether statements as to value constitute a fraud, see note in 35 L. R. A. 418, 436. And for false statement as to cost, selling, or market price of property, or as to offers therefor, see note in 35 L. R. A. (N. S.) 175.

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Orien S. Cross, Allegan circuit judge, to compel respondent to quash a writ of *capias ad respondendum.* Submitted October 7, 1913. (Calendar No. 25,621.) Writ denied November 3, 1913.

Roscoe G. Goembel and *D. O. French,* for relators.

Clare E. Hoffman, for respondent.

STONE, J. The relators were arrested upon a *capias ad respondendum.* They ask for a writ of mandamus, requiring respondent to set aside the order overruling their motion to quash the writ; and counsel for relators state that there is but one question for the determination of this court, and that is whether the affidavit filed in support of the writ of *capias ad respondendum* was sufficient to warrant the issuing of said writ, and the arrest of relators, and holding them to bail.

The first three paragraphs of the affidavit contain the statements as to the parties, the purpose of the affidavit, the value of certain personal property owned by affiant and his desire to sell the same, and the further statement that the facts and circumstances stated in the affidavit are within the personal knowledge of the affiant.

The fourth paragraph contains the direct statement that the defendants, relators here, with intent to cheat and defraud affiant and to obtain his personal property without adequate and just compensation, offered to procure and transfer to him certain real estate in exchange for affiant's said personal property; that said real estate was represented by said relators to be worth the sum of $2,100, and that the equity which was to be transferred to affiant was worth $1,225 cash.

The fifth paragraph contains the following language:

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"And for the purpose of inducing this affiant to transfer said personal property, and inducing this affiant to accept the transfer of said contract and said deed of said second described piece of land as security for the payment of said sum of $1,225, and to forbear insisting upon the payment of said sum of $1,225 immediately and before the transfer of said personal property, did then and there falsely represent and pretended to this affiant that the real estate described in said contract was worth $2,100 cash in the real estate market of the city of Kalamazoo, and that the equity in said contract was well worth the sum of $1,225 cash, * * * and did falsely represent and pretend to this affiant that the said real estate described in said deed above mentioned was worth the sum of $300 cash in the real estate market of the city of Kalamazoo, and that each of said pieces would readily sell for the sums above named at any time, and that said sums were a fair cash price for said pieces of real estate."

The sixth paragraph contains the statement that affiant believed and relied upon the representations made, and, being deceived thereby, did transfer the personal property and accept the assignment of the contract for the real estate, instead of the payment of the money.

The seventh paragraph was as follows:

"And affiant further avers that said real estate described in said contract, which said contract was assigned to this affiant, was not worth to exceed the sum of $1,300 in the real estate market of the city of Kalamazoo; that the equity in said contract was not worth to exceed $400, and that said second piece of real estate was not worth to exceed $75 in the real estate market of the city of Kalamazoo, and that neither piece would sell for more than said mentioned sums."

The grounds of the motion to quash the writ of capias are as follows:

(1) Because the affidavit upon which the order to hold to bail was based was insufficient to authorize defendants' arrest; (2) because the affidavit of the

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plaintiff contains nothing indicating that he is possessed of any knowledge of the value of real estate, or the real estate in question; (3) because the affidavit of plaintiff, upon which the writ is issued, contains nothing indicating that plaintiff is possessed of the knowledge requisite and necessary to render him competent to form or express an intelligent opinion upon the value of the real estate in question; (4) because the affidavit of the said plaintiff contains nothing to show that he is qualified or competent to testify to the value of said real estate, or that he ever saw said real estate, or has any knowledge thereof whatever; (5) because the affidavit of said plaintiff does not state where he resides or what his business is; (6) because said affidavit does not state where said defendants reside; (7) because said affidavit is based in part upon information, and not upon actual knowledge; (8) because said affidavit is in many other respects insufficient and inadequate upon which to base an order to hold to bail.

The respondent, in his answer to show cause, returns that all the grounds set forth in said motion as reasons why said writ should be quashed were upon the argument and hearing of said motion abandoned, except the second, third, and fourth, and that the only point urged and argued upon the hearing of said motion was the one that it appeared on the face of the affidavit that the affiant Dean did not possess sufficient qualification to justify him to give an opinion as to the value of the real estate situate in Kalamazoo city, and that the question as to the value of the property in Kalamazoo was one requiring the opinion of an expert, and that counsel's argument and citation of authorities were directed at this point, and this point alone; the two cases relied upon by him being *Church* v. *Calhoun Circuit Judge,* 129 Mich. 126 (88 N. W. 403), and *Gardiner* v. *Wayne Circuit Judge,* 155 Mich. 414 (119 N. W. 432). In this court relators' counsel discuss the further question that the allegations as to statements of value are mere mat-

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ters of opinion upon which men might fairly and honestly differ, and cannot be made the basis of a fraudulent representation.

1. We recognize the rule that a seller has a right to praise his property and to give his opinion concerning its value, but we have held that this rule cannot be extended to embrace false representations of alleged facts in a case which may be, and were, relied upon by the purchaser and became an inducing cause of the trade. A collection of Michigan authorities upon this subject will be found in *Wegner* v. *Herkimer,* 167 Mich. 587, at page 595 (133 N. W. 623), and we refer especially in that collection to the cases of *Maxted* v. *Fowler,* 94 Mich. 106 (53 N. W. 921), and *Peck* v. *Jenison,* 99 Mich. 326 (58 N. W. 312).

Can it be said that the language above quoted, that the defendants "did then and there falsely represent and pretended to this affiant that the real estate described in said contract was worth $2,100 cash in the real estate market of the city of Kalamazoo, and that the equity in said contract was well worth the sum of $1,225 cash, and that said real estate described in said deed above mentioned was worth the sum of $300 cash in the real estate market of the city of Kalamazoo, and that each of said pieces would readily sell for the sums above named at any time, and that said sums were a fair cash price for said pieces of real estate," was mere "seller's talk," or may it be said to be the representation of facts which might be relied upon by the purchaser and become an inducing cause of the trade? We are of opinion that the representation that property would readily sell in a certain market at a given price is the representation of an alleged fact, and, where relied upon as here stated, may be made the basis of a false representation.

2. This brings us to consider the only question that was argued before the respondent, Was the affidavit

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defective because it did not set forth the fact that the affiant was possessed of the knowledge requisite and necessary to render him competent to form or express an opinion upon the value of the real estate in question? It does appear upon the face of the affidavit, by direct statement, that affiant had personal knowledge of the facts therein set forth, and it seems to us that the question as to the value of the Kalamazoo property was one with which affiant might be familiar, and was one with which the affidavit itself shows he was familiar, and that the court has no right to hold as untrue affiant's statement that he had personal knowledge as to the value of the real estate described in said contract, and of the equity in said contract. We do not think that the case falls within the doctrine of the cases relied upon by relators' counsel.

The case of *Church* v. *Calhoun Circuit Judge, supra,* was an action against a physician for malpractice. The affidavit charged him with negligently performing a surgical operation upon the person of plaintiff's wife, thereby causing her death. In that case Justice HOOKER said:

"Were plaintiff offered, upon a trial of the cause, as a witness to prove the charge, his opinion as to the defendant's negligence would not be admissible. He would be competent to testify as to what the defendant did, or omitted to do; but whether what he did, or omitted, constituted negligence or unskillfulness, and whether the wife's death was a consequence or not, would necessarily depend upon the evidence of persons shown to possess technical knowledge."

In the instant case no question of expert testimony is involved, but any citizen having the requisite knowledge of values, might testify.

An examination of *Gardiner* v. *Wayne Circuit Judge, supra,* will show that the affidavit stated that affiant had been informed by the Union Trust Com-

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pany that Mr. Gardiner had forfeited his claim to the land; and it distinctly appeared that all the knowledge affiant had was contained in a notice of cancellation sent him by an officer of said company. This court held that such information was purely hearsay, and afforded no foundation for depriving a man of his liberty. It distinctly appearing that the statement that affiant had learned that Gardiner was not the owner of the land in fee simple was not a statement of personal knowledge and there being no further affidavit of the source of his information, it was held insufficient to justify the arrest of the defendant. These cases we think are readily distinguished from the case we are here considering.

Applying the rule laid down by this court in *Hatch* v. *Saunders*, 66 Mich. 181 (33 N. W. 178); *Paulus* v. *Grobben*, 104 Mich. 42 (62 N. W. 160); *Robinson* v. *Branch Circuit Judge*, 142 Mich. 70 (105 N. W. 25); and *Muir* v. *Wayne Circuit Judge*, 151 Mich. 117 (114 N. W. 659)—we are of opinion that the affidavit in the instant case was sufficient, and that the correct rule may be said to be that where the fact stated in the affidavit is one about which the testimony of any person having means of knowledge would be admissible, the affidavit need not set forth the source and extent of affiant's knowledge, where the affidavit contains the averment that he had personal knowledge of the facts and circumstances set forth in the affidavit. In other words, where an affiant in an affidavit for a capias charging fraudulent representations as to the value of real estate, makes the statement that the facts set forth are within his personal knowledge, and where the fact stated is one with which any witness might personally be familiar, and is one to which the ordinary witness might testify, and on which the testimony of an expert is not necessarily required, the court will not add to the statutory requirement, nor will it be held that all the

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things which merely go to determine the weight of the statement must also be stated in detail. To hold otherwise would be to require great prolixity in such an affidavit, and it is neither necessary nor customary to give these particulars in an affidavit for arrest, where the averment is one which appears to have been within the knowledge of the affiant. 1 Stevens' Michigan Practice, §§ 214, 215. This does not in any way conflict with the rule recently announced by this court in the cases of *Soule* v. *Ottawa Circuit Judge*, 175 Mich. 127 (140 N. W. 990), and *Rice* v. *Kalamazoo Circuit Judge*, 176 Mich. 322 (142 N. W. 336), as an examination of those cases will readily show.

We do not think that the circuit judge erred in denying the motion to quash. The writ of mandamus is denied, with costs against the relators.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, OSTRANDER, and BIRD, JJ., concurred.

COATSWORTH v. WAYNE CIRCUIT JUDGE.

1. MANDAMUS—APPEAL AND ERROR—SERVICE OF PROCESS.
   Mandamus is the proper remedy to review an order quashing service of a declaration on the ground that the defendant was exempt from service of process, since the ruling was not a final order reviewable on error; proper service being yet open to plaintiff.

2. PROCESS—SERVICE OF DECLARATION—PRIVILEGE—WITNESSES.
   That portion of Act No. 76, Pub. Acts 1905 (5 How. Stat. [2d Ed.] § 12648), authorizing service by declaration

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upon "any person, whether privileged from arrest or not," does not permit service on a defendant who is a resident of Canada and who enters the jurisdiction to attend, for the purpose of testifying, a proceeding in the Federal court to which he and the plaintiff were parties litigant.

Mandamus by Jennie Coatsworth against P. J. M. Hally, one of the circuit judges of Wayne county, to compel the respondent to set aside an order quashing service of declaration in an action commenced by relator against one George Jasperson. Submitted October 14, 1913. (Calendar No. 25,793.) Writ denied November 3, 1913.

Francis H. Warren and *M. J. Lehman & Sons*, for relator.

Devine & Snyder, for respondent.

OSTRANDER, J. Relator filed her declaration, entered a rule to plead, and caused the declaration to be served upon one George Jasperson, the defendant named in the declaration. The defendant moved for an order setting aside the service of the declaration for the reason that he was a resident of Canada, and at the time the declaration was served was within the jurisdiction of the court for the purpose of attendance upon the Federal court in a proceeding therein, to which proceeding he and relator were parties, and in which he was called and gave testimony as a witness. An order setting aside the service of the declaration was entered, and relator seeks here a writ of mandamus to set aside such order. The matter receives consideration in this court because the court below refused to retain jurisdiction of the cause, and because, further, the order setting aside the service of the declaration is not, necessarily, a final order, reviewable on error. That is to say, proper occasion presented, service of the declaration may still be

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made, and the service which was made is not void, but is voidable. *Watson* v. *Judge of Superior Court of Detroit,* 40 Mich. 729.

Relator relies upon a statute, found in the Revised Statutes of 1846, and since and now a part of the statute law of the State, last found with an amendment not here material in Act No. 76, Public Acts of 1905 (5 How. Stat. [2d Ed.] § 12648). The section reads:

"Actions brought for the recovery of any debt, or for damages only, may be commenced, either: 1. By original writ; or, 2. By filing in the office of one of the clerks of the court a declaration, to which is attached, or upon which is indorsed, a rule requiring the defendant to plead to such declaration within fifteen days after the service of a copy thereof and notice of such rule, and serving a copy of such declaration, and notice of such rule personally on the defendant; which mode of commencing an action may be adopted against any person, whether privileged from arrest or not."

It is said that, properly interpreted, this section denies to the defendant the privilege he asserts. It would seem that the contention of relator is answered by the decisions of this court in *Mitchell* v. *Huron Circuit Judge,* 53 Mich. 541 (19 N. W. 176); *Letherby* v. *Shaver,* 73 Mich. 500 (41 N. W. 677); *Jacobson* v. *Wayne Circuit Judge,* 76 Mich. 234 (42 N. W. 1110); *Cofrode* v. *Wayne Circuit Judge,* 79 Mich. 332 (44 N. W. 623, 7 L. R. A. 511); *Hoffman* v. *Bay Circuit Judge,* 113 Mich. 109 (71 N. W. 480, 38 L. R. A. 663, 67 Am. St. Rep. 458), unless, as is contended, the bar and courts of this State have not heretofore discovered the real signifiance of the concluding phrase of the statute. But in holding, as several times it has been held, that the privilege relied upon does not depend upon statute, and that the statute privilege from arrest does not exclude the common-law privilege of exemption from service of process

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in cases like this, the present contention of relator has been clearly answered.

The writ is denied. Defendant Jasperson will recover his costs from the relator.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and BIRD, JJ., concurred.

ROUSSEAU *v.* BROTHERHOOD OF AMERICAN YEOMEN.

1. WITNESSES — EVIDENCE — ESTATES OF DECEDENTS — MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED—AGENT—INSURANCE —PRINCIPAL AND AGENT.

   The testimony of mere clerk and bookkeeper of a local agent of defendant fraternal benefit association, relating to matters equally within the knowledge of a deceased member of the society, was not barred by 3 Comp. Laws, § 10212, as amended by Act No. 239, Pub. Acts 1901, and Act No. 30, Pub. Acts 1903 (5 How. Stat. [2d Ed.] § 12856). The term "agent," as used in the statute, does not have reference to a subagent whose appointment was not authorized or made by defendant corporation.

2. SAME.

   On the trial of an action upon a benefit certificate, the trial court erred in refusing to admit the testimony of a clerk of defendant's local agent, offered to show that decedent was in arrears and she sent him a notice as required by the rules of the society; and an admission of defendant's attorney that the testimony of the agent himself would be barred, was not binding on the court.

Case-made from Delta; Flannigan, J. Submitted November 11, 1912. (Docket No. 99.) Decided De-

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cember 17, 1912. Rehearing granted March 21, 1913. Opinion filed November 3, 1913.

Assumpsit by Eva Rousseau against the Brotherhood of American Yeomen on a benefit certificate. Judgment for plaintiff on a directed verdict. Defendant brings error. Reversed.

H. J. Rushton, for appellant.

A. H. Ryall and *John L. Loell,* for appellee.

OSTRANDER, J. The beneficiary in a policy or certificate of life insurance issued by defendant to one Frank L. Rousseau brought suit thereon. With its plea the defendant gave notice that it would prove in its defense, among other things, that when the insured died the said policy was not in force and had been canceled for nonpayment of dues; that at the time of his death the said Frank L. Rousseau was not a member in good standing of defendant organization and had not complied with the agreements, conditions, and covenants in said policy contained. At the trial the court directed a verdict for plaintiff and judgment was entered on the verdict. Error is assigned upon this ruling and the one upon which it is based, which excluded the books kept at the local homestead of the defendant and the testimony of a clerk of the agent of defendant upon the subject of nonpayment of dues by and suspension of the insured before his death.

It is stated in the brief for appellant that plaintiff made a *prima facie* case and that the question is whether one Carrie Weisert, the clerk of defendant's agent, was a competent witness for defendant to prove the nonpayment of dues by and suspension of the deceased.

The controlling statute is 3 Comp. Laws, § 10212, as amended by Act No. 239, Public Acts of 1901, and Act No. 30, Public Acts of 1903 (5 How. Stat. [2d

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Ed.] § 12856). Defendant undertook to prove nonpayment of assessments and dues and the suspension of the member because of such nonpayment and in assuming this burden called the witness Carrie Weisert. Before calling her, defendant's attorney had made the admission that, if Dupuis (defendant's agent) was called as a witness for defendant, he could not testify about matters equally within the knowledge of deceased. This admission was equally applicable to the witness Weisert if she was an agent of defendant and not, as defendant asserted, a mere clerk of an agent. *Wallace* v. *Mystic Circle,* 127 Mich. 387 (86 N. W. 853). See, also, *Great Camp K. O. T. M.* v. *Savage,* 135 Mich. 459 (98 N. W. 26); *Franken* v. *Supreme Court I. O. F.,* 152 Mich. 502 (116 N. W. 188). Dupuis, who at the time in question was the agent of defendant, his office being that of correspondent of Homestead No. 1284, testified:

"I hired Miss Weisert as helper around the house and with the books. I paid her."

Miss Weisert testified that she had worked for Dupuis for five years as bookkeeper, and, with respect to the business of defendant, she kept the books and did a little housework. She made out receipts, checked up the books every month, notified Dupuis of any members in arrears, sent out notices to members over the name of Dupuis. She identified a card (postal card, but sent in an envelope) as like those sent out to members. The information or data on these cards she got from the books. It is to be inferred from her testimony that she sometimes received dues or assessments from members and entered the same on the books. Concerning her competency the court said:

"Under the testimony as it stands, the young woman was such an agent of the insurance company in respect to the collection of dues and keeping account thereof and the giving of default notices that she

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would be disqualified to testify to matters equally within the knowledge of the deceased person. She is not exactly in the position of an ordinary bookkeeper or clerk or stenographer. A bookkeeper whose duty it is to enter upon the books the various matters which come into the office for the purpose is a mere clerk; but in this case this young woman collected the money herself and entered it on the books; and it seems to me the rule should be invoked in a case such as this, where the party brought on to testify is the very person interested in the matter of the correctness of the account. She is charged with the duty of making the collection, and then she is brought on to testify that this man did not pay her the money. It seems to me the object of the statute is to exclude just exactly that sort of testimony. If these collections were made by Mr. Dupuis or any other officer or employee of this company and sent in to the office in the regular course of business, and this woman simply entered them on the books, then I think she would be admitted to testify, to identify the books, and upon proper identification we might admit the books in evidence. But under the circumstances of this case the testimony of this young woman, all of it, is incompetent and must be excluded, and the jury will be instructed to pay no attention whatever to her testimony."

The statute excludes the testimony of officers and agents of the corporation. We held in *Krause* v. *Assurance Society*, 105 Mich. 329, 334 (63 N. W. 440), that the testimony of a clerk or stenographer in the office of an agent of the defendant was not excluded by the statute, remarking that:

"She was not in the employ of the company, but was an employee of the general agent at Detroit."

In *Brennan* v. *Railroad Co.*, 93 Mich. 156 (53 N. W. 358), it was said in applying the statute:

"In what sense is the word 'agent' employed? We think this section must be held to include only those who are authorized, in the matter with reference to which testimony is given, to act for the company."

In that case the question was whether a conductor

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and brakeman, admittedly agents of the company for some purposes, were agents for a particular purpose. See, also, *Wallace* v. *Mystic Circle*, 121 Mich. 263, 267 (80 N. W. 6).

It is true that the authority of an agent to employ a subagent may be implied; the acts of the subagent being treated in law as the acts of the agent and as such binding on the principal. Mechem on Agency, § 103; *Bodine* v. *Insurance* Co., 51 N. Y. 117 (10 Am. Rep. 566). In a sense, any clerk of an agent who under direction of his employer performs duties which the agent is bound to perform for his principal is a subagent. But we think the legislature, in the statute in question, has not used the term "agent" in this sense. Miss Weisert was a clerk of defendant's agent, without authority from and owing no duty to the defendant. She may have knowledge of matters which were equally within the knowledge of the deceased certificate holder. She was not an agent of defendant within the meaning of the statute, and her testimony ought to have been received. It is said by appellee that, if erroneous, the ruling excluding the testimony of the witness was without prejudice. This contention is rested upon what afterward occurred upon the trial of the case. The record discloses that counsel for defendant said to the court:

"We have a statute that makes it mandatory for a notice to be sent by the agent of the company, and then the statute says in another breath that the agent cannot swear that he sent that notice; then a man might be in arrears for six months, and we could not in any way defend ourselves against such a proposition as that."

The court replied:

"The statute provides a method whereby you could make this proof, but you haven't followed that method."

The statute referred to is 2 Comp. Laws, § 7525, re-

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lating to co-operative associations, and provides that an affidavit made by the person having charge of the mailing of such notices shall be *prima facie* evidence thereof. By stipulation counsel for defendant filed such an affidavit made by Carrie Weisert. Thereupon counsel for plaintiff recalled her for cross-examination and interrogated her concerning the signing and mailing of the notice. The notice itself indicated that the member was not at the time of sending the same suspended but would be suspended if the assessment, called to his attention by the notice, was not paid before the end of the month. It is said that the concession or admission of counsel for the defendant, the language of the statute last above referred to, and the notice sent out negative the fact that a proper notice was sent. In this connection counsel for plaintiff (appellee) contends that the admission or concession of counsel is binding, citing *Connor* v. *Railway Co.*, 168 Mich. 29 (133 N. W. 1003). In directing a verdict for plaintiff, the court said that there was no evidence tending to prove any breach of the conditions of his policy and made no specific ruling concerning the effect of the testimony just referred to.

The admission or concession of counsel for the defendant as to the applicability of the statute is not binding upon the courts, and *Connor* v. *Railway Co.* is not an authority in point. Various considerations, including the laws of defendant, set out in the record influence us not to determine the effect of the notice which was sent to the insured.

The judgment is reversed, and a new trial granted.

The opinion of this court in this case filed December 17, 1912, is recalled.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and BIRD, JJ., concurred.

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In re FOERSTER'S ESTATE.

GUMTOW *v.* JANKE.

1. WILLS—PRESUMPTIONS—REVOCATION—LOSS.
   The presumption that testator revoked his will, from not finding the instrument or from finding it mutilated, is not overcome by proof that persons who would be injuriously affected by it had opportunities to destroy or mutilate it; but if other suspicious circumstances exist the presence of motive for its destruction may sustain a finding that the will was unlawfully destroyed.

2. SAME—TRIAL—FINDINGS.
   On the trial of a will contest, findings, in answer to special questions submitted to the jury, that decedent executed the will proposed for probate, were conclusive on the contestant who submitted the questions.

3. SAME—EVIDENCE.
   Upon considering all the testimony in relation to competency of the testator, undue influence, and due execution of the will, it is *held*, that there was no competent evidence of undue influence but the other questions were for the jury.

4. SAME—ADMISSIONS—REVOCATION, PROOF OF.
   Statements of the testator, made subsequent to the execution of a will, tending to show his purpose to revoke the will, were properly received in evidence, in connection with affirmative testimony that he destroyed it by tearing.

5. SAME.
   Held, also, that the evidence was insufficient to rebut the presumption that testator had revoked the testament, arising from nonproduction of the instrument, and that the verdict was contrary to the great weight of evidence.

6. SAME—TRIAL—SPECIAL QUESTIONS—JURY.
   It was error to submit to the jury a special question as follows: "Did said August Foerster tear or burn said will on August 25th, intending to revoke the same?" The question could not be answered unequivocally and intelligently.

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7. SAME—UNDUE INFLUENCE.

Where the contestant, after the death of the testator, presented two petitions to the probate court, stating that the deceased left no will, and she was his only heir, and proponent claimed the statements were fraudulent, and where the contestant, as an explanation, claimed she did not know the instrument in question was a will, that she had signed the petitions without reading them and supposed her brothers and sisters were dead, the facts had no tendency to establish undue influence.

Error to Wayne; Mandell, J. Submitted October 8, 1913. (Docket No. 10.) Decided November 3, 1913.

Emil Gumtow and others presented for probate the last will of August Foerster, deceased. Anna Janke, Marie Remus, and Gustave Foerster contested the allowance of such instrument. From an order denying the petition proponents appealed to the circuit court. Judgment for proponents, contestant Janke brings error. Reversed.

Arthur H. Covert (Henry B. Graves, of counsel), for appellant.

James H. Pound, for appellees.

STONE, J. This case presents a contest over a petition to probate an alleged lost or destroyed will of August Foerster, deceased. The petition was denied in the probate court of Wayne county, and proponents appealed to the circuit court where the matter was tried before a jury, which found said alleged lost will to be the last will and testament of August Foerster, deceased. The case is brought into this court upon writ of error by Anna Janke, one of the contestants, and sister of the alleged testator. The proponents of the alleged will are Emil Gumtow and Ernest Gumtow, children of a sister of the alleged testator's wife, living on a farm near New Boston, Wayne county, Ernest Krause and John C. Hecker of Detroit, who

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are not related to the alleged testator but were friends of his. There are a number of beneficiaries besides the proponents under the alleged will. A copy of the alleged will, found by the jury to be correct, is as follows:

"August Forster (a widower), of the city of Detroit, county of Wayne, State of Michigan, being of lawful age, sound mind and memory, do hereby make, publish and declare the following to be my last will and testament, that is to say:

"1. I hereby revoke any and all wills by me heretofore made, same to be null and void.

"2. I hereby empower and instruct my executor hereinafter named to pay all my lawful debts and funeral expenses as soon as possible after my decease.

"3. I hereby give and bequeath to my sister, Anna Janke, her heirs and assigns, of Detroit, Mich., the sum of five hundred dollars.

"4. I hereby give and bequeath to Maria Rennis, her heirs and assigns, Berlin, Germany, the sum of five hundred dollars.

"5. I hereby give and bequeath to Carl Foster, his heirs and assigns, of Lignitz, Schlesian, Germany, the sum of five hundred dollars.

"6. I hereby give and bequeath to Gustav Foster, of Mecklenburg, Germany, his heirs and assigns, the sum of five hundred dollars.

"7. I hereby give and bequeath to Ernst Krause, his heirs and assigns, of Detroit, Mich., the sum of four hundred dollars.

"8. I hereby give and bequeath to the Arbeiter Society No. 1, of Detroit, Mich. (incorporated), the sum of five hundred dollars.

"9. I hereby give and bequeath to Leo Kemp, M. D., his heirs and assigns, of Ypsilanti, Mich., the sum of two hundred dollars.

"10. I hereby give and bequeath to John Hacker, his heirs and assigns, of Detroit, Mich., the sum of one hundred and fifty dollars.

"11. I hereby give and bequeath to Emilie Gumtow, his heirs and assigns, of New Boston, Mich., the sum of two hundred dollars.

"12. I hereby give and bequeath to Bertha Krech-

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low, her heirs and assigns, of Ann Arbor, Mich., the sum of two hundred dollars.

"13. I hereby give and bequeath to Emma Baisch, her heirs and assigns, of Ann Arbor, Mich., the sum of five hundred dollars.

"14. All my wearing apparel I hereby give and bequeath to Carl Gumtow, of New Boston, Mich.

"15. All the residue of my household goods and furniture of every description, I hereby give and bequeath to Emil Gumtow and Ernst Gumtow, of New Boston, Mich., to be divided between them as they mutually agree.

"16. All the residue of my estate, real, personal and mixed, of whatever description of which I may be possessed at the time of my decease, I hereby give, bequeath and devise unto Ernst Gumtow and Emil Gumtow, their heirs and assigns, of New Boston, Michigan, share and share alike, and I hereby charge my above estate with the payment of the above stated legacies.

"17. I hereby appoint and nominate Emil Gumtow of New Boston, Mich., executor of this my last will and testament with full power of sale any and all of my estate whatsoever and at such price as he shall see just and fit.

"In witness whereof I have hereunto set my hand and seal this 19th day of August, 1910.

"AUGUST FORSTER.

"The above instrument was at the date hereof signed and declared by the testator as and for his last will and testament, testator signing in our presence and we, at his request and in his presence and in the presence of each of us, have signed our names hereto as attesting witnesses.

"A. J. HUGLI,
"JOS. KAUFMANN."

The contestants in the circuit court were Anna Janke, at whose house August Foerster died and where he lived for nearly a year and a half after his wife died, Marie Foerster Remus and Gustave Foerster, a sister and brother of deceased, living in Germany. Anna Janke is the wife of Herman Janke.

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August Foerster, the alleged testator, died September 6, 1910, at the home of his sister, Anna Janke, and her husband, at 744 Jos. Campau avenue, in the city of Detroit. Mr. Foerster came to this country from Germany about 25 years ago, and, after living in Toledo for a while, came to Detroit, where he lived for many years up to the time of his death. His business was that of weaving willow baskets by hand and making baby carriages in a small way, and he and his wife also kept a small candy store for many years on Gratiot avenue. He had accumulated some property, and at the time of his death owned four houses and lots in the city of Detroit, valued at about $8,000, life insurance amounting to $600, and less than $50 in a bank. He had no children and no blood relatives in this country, except his sister, Anna Janke, the contestant.

"Mr. Foerster's wife died January 16, 1909, at his own home on Sherman street, in Detroit; and soon after his wife's death he began to take his meals and to stay overnight part of the time at the home of his sister, Anna Janke; and about the middle of April, 1909, he moved over to the house of his sister, where he lived up to the time of his death, except when in the hospital on two occasions for a few days each. During all the time that Mr. Foerster was living at the house of contestant he was in poor health, and much of the time under a physician's care, suffering from Bright's disease and hardening of the liver. He grew worse and suffered from a dropsical condition and had to be tapped several times. The alleged will was executed August 19, 1910, at St. Mary's Hospital. The next day Dr. Heugle (or Hugli) tapped Mr. Foerster and removed about one quart of fluid serum. This dropsical condition extended over his whole body. During all the time that Mr. Foerster was living at his sister's house she nursed him and cared for him. He first went to Harper Hospital for a short time in May,

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1910. On the last occasion he was in St. Mary's Hospital from August 17 to August 23, 1910. On the last-named day he was taken back to the home of the contestant, where he remained until his death. He was 58 years old when he died.

At the time the alleged will was drawn in St. Mary's Hospital, Mr. Foerster also executed a general power of attorney to Mr. Kaufmann, the attorney who drafted the alleged will. This power of attorney authorized Mr. Kaufmann to mortgage any and all property then owned or thereafter to be owned by said Foerster and to deal generally with any of his property as he himself might do. Mr. Foerster then also signed a notice to Herman Janke and Anna Janke that he had appointed Mr. Kaufmann as his attorney to demand and collect all property of said Foerster, including household goods and wearing apparel, at their premises in Detroit. This notice was served on Anna Janke August 20th, but she refused to turn over any of Foerster's belongings to Kaufmann on this demand, saying that she could not tell what her services for Foerster's care were worth; that she would have to consult somebody else who knew what to charge for such services. It was conceded that she had been paid $5 a week by Foerster.

On the morning of August 23d Mrs. Janke called at Kaufmann's office and he went with her to St. Mary's Hospital, where Foerster then was. She complained that Foerster was not taken care of at the hospital, and that he would have to come home with her. That same day, in the afternoon, Kaufmann was in St. Mary's Hospital alone with Foerster, and the latter told Kaufmann that he should leave the furniture with his sister, Anna Janke, and he instructed Kaufmann to draft a codicil to the alleged will, saying:

"My sister is not satisfied and you had better draft a codicil; she will not tell what I owe her, and she makes some kind of a claim; and in order to save liti-

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gation you had better draft a codicil and give her $1,000 more."

Kaufmann drafted such a codicil, but it was never signed by Foerster.

On the 25th day of August, two days after Foerster was taken back to the home of his sister, he sent to Kaufmann to bring back his papers, and in the afternoon of that day Kaufmann, with Dr. Heugle, one of the witnesses to the alleged will, went to Mrs. Janke's house, where Foerster then was, and Foerster, in the presence of Anna Janke, the contestant, demanded back the power of attorney from Kaufmann and revoked the power of attorney by writing these words across the face of it:

"DETROIT, Aug. 25/10.

"I hereby revoke the within instrument, the same to have no further effect.

[Signed] "AUGUST FORSTER."

At the same time the alleged will was given to Foerster, at his request, by Kaufmann, who had had it in his possession from the time of its execution up to that time. When the alleged will was handed back to Foerster by Kaufmann, it was in an envelope, and Foerster receipted for the will. Kaufmann charged $35 for his services. Foerster was not satisfied with this charge, but after some explanation and controversy Foerster finally said to his sister, Anna Janke, "Go and get the money and never mind." She went and got the money and gave it to Kaufmann, who gave a receipt for the same. Foerster then seemed satisfied, and Kaufmann left and never saw Foerster again.

It appeared upon the trial that on June 18, 1910, August Foerster had drawn and signed a holographic will in the German language, which was witnessed by one Dr. George and another witness. Dr. George had been his attending physician at one time. By the terms of this holographic will August Foerster gave

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to his sister, Anna Janke, all of his property, except that he made legacies to his nephews Emil and Ernest Gumtow in the sum of $200 each. This paper was handed by Foerster to his sister without stating what it was but with the injunction to keep it with her papers and never give it to any one. Her husband testified that he heard August Foerster call the paper a will. This paper was put in evidence as tending to show decedent's state of mind at the time.

There was evidence on behalf of the proponents tending to show that the contestant Anna Janke had dominated the said August Foerster during his sickness and residence with her, had kept him secluded, and would not allow his friends, and especially the Gumtows, to visit him, and that at times Foerster had complained of the manner in which he was treated by her. All claimed misconduct and undue influence on the part of Anna Janke were denied by her, and she testified that when she kept her brother secluded it was when he was not in a condition to be visited because of his sickness, and that she acted under the advice of the physician. There was much conflicting testimony pro and con upon this branch of the case, and evidence was offered by the contestant Anna Janke, showing numerous statements made by August Foerster that he intended to give his property to her because of her care of him in his sickness.

There is no dispute that the alleged will of August 19, 1910, was delivered to August Foerster, the alleged testator, by Mr. Kaufmann, as above stated, and it was never seen afterwards by any persons, unless it was seen by the contestant Anna Janke and her husband. They both testified positively that, soon after Kaufmann left, the said alleged will was torn up and burned by August Foerster.

Upon that subject Anna Janke testified as follows:

"At that time my husband came in, because he

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didn't know anything about this, and he asked Mr. Foerster and said, 'Gus, how do you feel today?' And he says, 'How shall a man feel; here is the last will.' And Mr. Janke says, 'Why, let me see that paper;' and Foerster said, 'No, you cannot see it;' and at that time he tore the last will in pieces; he went then, after he tore the will to pieces, and walked into the kitchen, it was the room next to this one, and I had supper on the stove, and fire in the stove, and he threw the pieces of paper in the stove, the pieces of the will in the stove and burned them up.

"*Q.* Had either you or Mr. Janke read that will?

"*A.* No, we never had a chance to see it. Mr. Foerster didn't tell us what was in it. We didn't have a chance. I didn't see even how the paper looked. I didn't have any chance. Yes, sir; that was the paper that Kaufmann gave him. Yes, sir; that was the will."

Upon this subject Herman Janke testified as follows:

"When I entered the house I saw Mr. Foerster sitting in the chair in the sitting room, sitting at the table, and my wife was there too. He seemed to be feeling all right. He had some papers and was reading in it and I says, 'Well, August, how do you feel?' And he says, 'How should I feel?' He says, 'See here, Herman, Kaufmann was here and brought back the will; he charged me $35 for it;' and I says, 'Let me see it;' and he says, 'No, you don't need to see it;' and he tore it in pieces and walked out in the kitchen and burned it up; and he said, 'Yes, all come running after me and wants my money, and no one would do anything for me for I stunk too much.' His mind was clear on that day. He lived about two weeks, or a week and a half after that, a little over a week and half, lived up to September 6th. He was able to go around the house after that about a week."

The testimony of the witnesses Jacob Squire, Ludwig Schultz, Christie Meiers, and Christine Meiers was to the effect that after the making of the last will, and after he had returned from the hospital, decedent said on different occasions that his sister, the con-

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testant, was to have all of his property and gave as a reason that she had taken good care of him in his sickness. The case was submitted to the jury.

The court was requested by said contestant, in her third request, to charge the jury as follows:

"I charge you that there is no evidence of undue influence exercised upon the decedent by Anna Janke, his sister, after his return to her home from St. Mary's Hospital."

This request was refused.

The court, among other things, charged the jury as follows:

"A will is not presumed to be in force because it was once executed, if it cannot be found. If not traced out of the testator's hands, it is presumed to have been revoked by him by destruction. That is true. That is merely the presumption with regard to the nonappearance of a will. There is a presumption of law that where the will is not produced, and it has been destroyed, it was destroyed by the testator. That presumption is a presumption of law, but may be overcome by constant (competent?) evidence."

The following special questions were submitted to the jury by the contestant Anna Janke:

(1) "Did August Foerster execute a will and testament while at St. Mary's Hospital?" This question was answered by the jury "Yes."

(2) "If August Foerster did execute a will while at St. Mary's Hospital, was his mind and memory so weakened by disease, the accumulation of urine, and medicines given to him while there that he did not have sufficient mind and memory to understand what he was doing and his relation to the different beneficiaries?" Answer: "No."

(3) "Were the contents of said alleged lost or destroyed will, if one was made, the same as the copy thereof offered by proponents Gumtow *et al?*" Answered: "Yes."

The following special questions were submitted to the jury by the other contestants:

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(1) "Did the deceased, August Foerster, on the 19th day of August, 1910, execute a last will and testament containing the same provisions as the copy offered in evidence by proponents on the trial of this cause?" Answered: "Yes."

(2) "Did said August Foerster then have sufficient mental capacity to understand and execute such a will, and was he free from any undue influence at the time?" Answered: "Yes."

(3) "Did said August Foerster tear or burn said will on August 25th, intending to revoke the same?" Answered: "No."

By appropriate assignments of error the contestant and appellant has, by her counsel, raised and argued the following propositions:

(1) That there was no evidence in the case tending legitimately to overcome the *prima facie* presumption of revocation of the alleged will because of its nonproduction. It is urged that there is in the record much direct and positive evidence that Mr. Foerster was not satisfied with the alleged will after it was drawn, and that there was much direct and positive evidence that the terms of the alleged will were directly opposed to the testator's intentions, as often expressed during the last two years of his life.

(2) That there was no evidence of any undue influence exercised upon decedent by Anna Janke, his sister, after his return to her home from St. Mary's Hospital.

(3) That the verdict was clearly against the great weight of the evidence.

1. It is the claim of appellant that a verdict should have been directed for the contestant, and her counsel quote the following language from Thornton on Lost Wills, § 56:

"A will that cannot be found at the death of the testator upon proper search made is presumed to have been destroyed by him *animo revocandi*. This is particularly true where it is traced to the testator's possession and never traced out of it. The law presumes that the will was in his possession and so continued until he destroyed it. But whether or not the will is

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in his possession, the presumption of revocation prevails, with the distinction that stronger evidence to overthrow or rebut it is required in the case of possession than in a case where it is traced out of his possession"—citing a great many cases.

It is urged by appellant that it is not sufficient to show that persons interested to establish intestacy had an opportunity to destroy the will; that proponents must go further and show by facts and circumstances that the will was actually fraudulently or accidentally lost or destroyed and against and not in accordance with the wishes and intentions of the testator; that there must always be some suspicious facts in addition to the presence of motive and opportunity to justify a finding that the will had been unlawfully destroyed. The rule is stated in Rood on Wills, at section 357, as follows:

"The presumption of revocation from failure to find the will, or from finding it mutilated, is never conclusive and exists only in the absence of evidence to the contrary. All the circumstances of the case may overcome it, though there may not be any one circumstance sufficient in itself to do so. It may be disproved in most States by showing inconsistent declarations of the testator, though not part of the *res gestæ;* and it may be confirmed by showing other declarations indicating that the will was revoked"—citing *Lawyer* v. *Smith,* 8 Mich. 411 (77 Am. Dec. 460), and *Harring* v. *Allen,* 25 Mich. 505. * * *

"It has been held that the presumption of revocation from not finding the will or from finding it mutilated is not overcome by proof that persons injuriously affected by it had opportunities to destroy or mutilate it. But that would seem to be a matter that should be left to the jury to determine. Certainly the presence of motive cannot be entirely ignored and may suffice with a few other suspicious facts to justify a finding that the will had been unlawfully destroyed."

Whether or not the presumption of revocation is

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rebutted is a question for the jury. Thornton on Lost Wills, § 73, citing cases.

The rule seems to be well stated by the supreme court of Wisconsin in *Gavitt* v. *Moulton*, 119 Wis. 35, at page 49 (96 N. W. 395), where Chief Justice Cassoday uses the following language:

"True, the mere fact that the contestant had an opportunity to destroy the will would not of itself overcome the presumption that it was destroyed by the testator with the intent to revoke it; still it is a circumstance to be considered with other proof. Thus it is stated by a standard text-writer that:

"'If a will last traced to the testator's custody cannot be found at his death, the presumption that he destroyed it for the purpose of revocation outweighs the probability of its fraudulent and criminal destruction by another when unsupported by any evidence except that of opportunity, though this latter circumstance is always worthy of consideration with other proof.' Schouler on Wills (3d Ed.), § 402."

Cheever v. *North*, 106 Mich. 390 (64 N. W. 455, 37 L. R. A. 561, 58 Am. St. Rep. 499); *Ewing* v. *McIntyre*, 141 Mich. 506 (104 N. W. 787); *In re McIntyre's Estate*, 160 Mich. 117 (125 N. W. 51). Many cases might be cited from other jurisdictions.

A careful examination of this record satisfies us that the court did not err in refusing to direct a verdict in the case, and that there was no error in permitting the case to go to the jury. We are of opinion that there was evidence in the record which, if believed by the jury, warranted them in finding that the alleged will of August 19, 1910, was duly executed by the testator, and that he was mentally competent to execute the same, and that the same was executed without undue influence. We think that it became a question of fact for the jury.

Their finding upon this subject established the will in the first instance. And their answers to the special questions by contestant are binding upon her. *Druck* v. *Lime Co.*, *ante*, 364 (143 N. W. 59-62).

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2. We have endeavored to read this record with care, and we are unable to find any evidence of undue influence exercised upon decedent by Anna Janke or her husband after decedent's return to the Janke home from St. Mary's Hospital. There is evidence in the case that Mr. Foerster was not satisfied with this will before he left the hospital, and that he gave instructions to Mr. Kaufmann to prepare a codicil. It is consistent with this record to say that Mr. Foerster became somewhat dissatisfied with conditions at the hospital and wished to return to the home of his sister; that he did return there of his own volition; that he sent for Mr. Kaufmann, the custodian of his will and his attorney under the power given him; that he demanded that these papers be delivered back to him; that they were so delivered to him while in his right mind; and from that time on there is no evidence that he did not do with the papers what he saw fit and uninfluenced. Not being satisfied with the alleged will as drafted, it was not unnatural for him to destroy the paper, intending to leave matters in the condition in which they were before the will was executed. His subsequent statements, made after his return home, to witnesses Jacob Squire, Ludwig Schultz, Christie Meiers, and Christine Meiers are consistent, and only consistent with the revocation of the last will. That these statements made by him were competent evidence appears to be settled by authority. *Lawyer* v. *Smith, supra; Harring* v. *Allen, supra.* See, also, opinion of Chancellor Walworth in *Betts* v. *Jackson,* 6 Wend. (N. Y.) 173.

If we were therefore to eliminate the testimony of Anna Janke and her husband as to the destruction of the will, we have left the fact that the will was traced to decedent; its nonproduction after his death, with the presumption of revocation; and the undisputed evidence that he was dissatisfied with some parts of the will, and his subsequent statements in support of

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revocation. There was no evidence that either Anna Janke or her husband ever knew the contents of the will. We think that contestant's third request to charge should have been given. We find that not only was it not given but that the substance thereof was not given to the jury.

3. Was the verdict clearly against the great weight of the evidence? If, as we have found, the jury were warranted in saying that the evidence was sufficient to establish the will in the first instance, of which we have no doubt, and if we are correct in saying that there was no evidence of any undue influence exercised upon decedent by his sister, the contestant, after his return home from St. Mary's Hospital, should it not be held that the verdict upholding the will is clearly against the great weight of the evidence? We have looked in vain for any evidence showing any undue influence exercised by the contestant or her husband over or upon the decedent after his return from the hospital. He seems to have been given every liberty and opportunity to see his friends, and he was visited by two of the beneficiaries under the will, Ernest Krause and John C. Hecker. There is no claim that they did not have free access to him and the opportunity to talk with him untrammeled. It appears that he did not mention the will to either of them after his return home. The subject seems to have been dropped by him, and his conduct was consistent only with the theory of a revocation.

The point that the verdict was contrary to the weight of the evidence was raised in a motion for a new trial. The circuit judge gave his reasons for denying the motion in writing, in which he said that in his opinion the verdict of the jury was not against the weight of the evidence. He laid stress upon the fact that, notwithstanding the testimony of Anna Janke, the contestant, and her husband, that the will made at the hospital was subsequently torn in pieces

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and put into the fire by the deceased, it was likewise true that it was claimed by the proponents and established as a fact that both of these witnesses had not only an opportunity to destroy such will but an interest in so doing. The theory of the charge seems to have been that the will was destroyed.

The third special question proposed by the contestant Gustave Foerster should not have been submitted to the jury. It was a double question and could not be answered unequivocally and intelligently. The question we have already quoted, but, being brief, we will here repeat it: "Did said August Foerster tear or burn said will on August 25th, intending to revoke the same?" It was answered "No." This answer is consistent with the idea that, although August Foerster did tear or burn the will on August 25th, he did not do so intending to revoke the same. If he did tear or burn the will on August 25th he would naturally intend thereby to revoke the same, unless the acts were done either by mistake, by undue influence, or when not in his right mind; and there is no evidence to support either of such positions. A review of the evidence of the conduct of the parties subsequent to the making of the will of August 19, 1910, satisfies us that there was an entire lack of evidence necessary to overcome the presumption of revocation by the nonproduction of the will. We think it is our duty in such a case, where the question is raised as it was here by a proper assignment of error after the denial of a motion for a new trial, to set aside the verdict. For authority to do so we need only refer to the case of *In re McIntyre's Estate, supra.* We are of the opinion that the verdict was clearly against the great weight of the evidence.

It was claimed upon the argument that there was fraud on the part of the contestant in that after the death of August Foerster she made two petitions to the probate court for the appointment of a special ad-

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ministrator of his estate in which she stated that he left no will, and that she was the only heir. It will be observed that the last will contained a clause revoking all former wills. She was probably wiser than she knew when she said he died without a will, for if the last will was ever made, which the jury found was the fact, it revoked the former will, and when the last will was destroyed the deceased might well be said to have died intestate. Her excuse for this conduct was that she did not know that the paper of June 18, 1910, was a will. She is a German woman and does not read English and testified through an interpreter, and she says that she signed the petitions as they were prepared by her attorney, without knowing their contents. Referring to her statement that she was the only heir, she claimed that she supposed her brothers and sisters in the old country were dead; that she had written to them and had received no reply, and after so many years had elapsed she supposed them dead. Here again she says she signed the papers as prepared by her attorney. Whether these excuses were sufficient or not, the mere fact that she made the petitions and afterwards made another one praying for the admitting to probate of the will of June 18, 1910, such conduct contains no evidence of any undue influence exercised by her upon the decedent after he left the hospital.

We have not overlooked the other assignments of error but are of opinion that they are without merit.

For the errors pointed out the judgment of the circuit court is reversed, and a new trial granted.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, OSTRANDER, and BIRD, JJ., concurred.

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PATTERSON v. GORE.

1. APPEAL AND ERROR—SAVING QUESTIONS FOR REVIEW—EXPERT TESTIMONY.

The objection that evidence was incompetent and immaterial did not raise the point for review on error that the witness was not qualified to give testimony upon the question of value of a horse; and where plaintiff bought a horse of defendant which failed to conform to defendant's warranty and received another horse on returning the first, and it was shown that the second horse failed to conform to the guaranty made by defendant, testimony to show the value of the second horse, which plaintiff also returned, was not incompetent or immaterial, within such objection.

2. TRIAL—RULING OF COURT—APPEAL AND ERROR.

The action of the trial court in stating what plaintiff claimed, was not erroneous or reversible in the absence of an exception.

3. APPEAL AND ERROR—ARGUMENT.

Improper or prejudicial argument of plaintiff's counsel cannot be reviewed unless the record shows that appellant called the matter to the attention of the trial court by objection or request to give instructions.

4. AMENDMENT—PLEADING—DAMAGES—DECLARATION.

It was within the discretion of the court, on appeal from justice's court, to permit plaintiff to amend his declaration so as to permit the recovery of the profit he would have made on the purchase of the horse if it had been as represented, the parties having tried the case on that theory and testimony being admitted without objection to show the value of a horse that would correspond with the representations.

5. DAMAGES—BREACH OF WARRANTY—SALES—FRAUD.

In an action for breach of warranty of a horse which plaintiff returned on discovering its true condition, his measure of damages was rightly held to be the value of such

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a horse as defendant represented the animal to be, defendant refusing to refund the price.[1]

6. APPEAL AND ERROR—EXCEPTIONS TO CHARGE.

Without taking exceptions to the charge of the court, plaintiff was entitled to assign error on the charge to the jury pursuant to Act No. 52, Pub. Acts 1901, 3 Comp. Laws, § 10247 (5 How. Stat. [2d Ed.] § 12960).

Error to Grand Traverse; Mayne, J. Submitted October 10, 1913. (Docket No. 19.) Decided November 3, 1913.

Assumpsit in justice's court by John Patterson against Chester Gore for breach of warranty. From a judgment for plaintiff, defendant appealed to the circuit court. Judgment for plaintiff. Defendant brings error. Affirmed.

John W. Patchin, for appellant.

M. G. Paul, for appellee.

STONE, J. This case originated in justice's court. The return of the justice upon appeal shows that the declaration and bill of particulars were in writing, in a plea of trespass on the case upon promises, to plaintiff's damage $150. The plea was the general issue. No written declaration or bill of particulars was returned to the circuit court. In the circuit court the trial proceeded upon the merits of the case without any question being raised upon the condition of the pleadings until near the close of the trial.

In his opening statement to the jury, plaintiff's counsel claimed that in June, 1911, plaintiff purchased a horse of the defendant for $75, and that defendant represented the horse to be sound in every respect except that it was blind; that plaintiff, relying upon the representation, paid for the horse, but it proved to

[1] As to what amounts to a breach of warranty of soundness of a horse, see note in 32 L. R. A. (N. S.) 182.

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be unsound, wind broken, and worthless; that plaintiff, discovering these facts, returned the horse to the defendant who accepted it and turned over to the plaintiff another horse to be tried, which second horse defendant also represented to be free from blemishes and sound in every respect except that it was cock-ankled; that plaintiff took this second horse and gave it a trial, but it proved unsound and was returned to defendant and accepted by him; that, after some parleying between the parties, the plaintiff demanded his money back, the claim of the plaintiff being stated by his counsel as follows:

"Mr. Patterson demanded his money back with the price of the feed and keep of this worthless horse, the difference between the horse he delivered to him and the kind of a horse he ought to have had. Mr. Gore utterly refused to Mr. Patterson any satisfaction in any shape or manner, so Mr. Patterson brought this action for breach of warranty, and for fraud practiced upon him, and for the $75, for the difference between the horse that Mr. Gore sold him if he had been such a horse as he represented him to be."

The testimony of the plaintiff tended to support his claim, and he testified, both upon his direct and cross-examination, that if the blind horse had been sound as represented by defendant it would have been worth $125, but that it was worthless.

There was upon the trial a sharp conflict between the parties as to the terms of the bargain and as to what was done by the parties; the defendant denying the warranty of the first horse and claiming that the second horse was received in settlement of the whole matter and that the second horse had never been returned to him. This evidence was all submitted to the jury under a lengthy and proper charge.

Upon the trial one Isaac Stanton was examined on behalf of the plaintiff and, while testifying with refer-

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ence to the second horse, was asked the following question by plaintiff's counsel:

"*Q.* What, in your judgment, would a horse of that size and description, age, color, weight and condition, afflicted as this horse was, be worth at that time, and the price of horses being as they were at that time?"

This question was objected to by defendant's counsel as incompetent and immaterial. The court overruled the objection. The defendant's counsel added:

"Defendant excepts for the reason that it was not at the time that the horse was delivered to this man but it was two or three days later, and, under the circumstances which he has related as he found him there, it would not be competent in this inquiry for him to put a value upon the horse at that time."

After the close of the plaintiff's testimony, and after the opening statement of the defendant, the court asked counsel a question as to the measure of damages in the case, and, after some colloquy between the court and counsel, defendant's attorney said:

"What do I understand, then, that their position is?

"*The Court:* It is that they are entitled to recover the difference between what the blind horse was actually worth at that time and place in that market and what he would have been worth had he been only blind; that is the plaintiff's position."

There was no exception to this remark of the court.

In his argument to the jury plaintiff's counsel, in referring to a witness for the defendant, by the name of Chavaneau, said:

"I say to you, gentlemen of the jury, that Mr. Chavaneau was more or less intoxicated that day. He had been drinking that day and was more or less intoxicated."

Whereupon defendant's counsel said:

"Note an exception to that; there is no evidence of it whatever."

There is some confusion in the record as to the order in which the following proceedings were had.

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It is apparent that the trial court discovered that there was no written declaration on file in the case; the court saying:

"There is no declaration in the case, simply the justice recites that a declaration in writing was presented and a plea in an action of trespass on the case upon promises.

"*Defendant's Counsel:* I would have no objection to his putting that declaration in if he says it is a copy of the one filed in justice's court. I didn't try the case below; Mr. Patchin did; and I looked over the files before coming in here, and there was no declaration filed."

The record discloses that, on the trial, there was filed the draft of a declaration containing the common counts in assumpsit, with blanks unfilled, and containing the following special count:

"And whereas heretofore, to wit, on or about the ——— day of ———, A. D. 1911, at the township aforesaid, in consideration the plaintiff, at the special instance of defendant, would buy of him (said defendant) a certain horse, at and for the sum of $75, he (the said defendant) undertook and then and there faithfully promised plaintiff that the said horse was sound and all right except both eyes were blind, and that, if said representations so made as aforesaid or any of them should prove untrue, he (the said defendant) would upon the return to him (the said defendant) of said horse provide the said plaintiff with another horse that was sound and all right in every way.

"And the said plaintiff says that, relying on said representation on or about the date last aforementioned, plaintiff did buy said horse and did pay to defendant the said sum of $75 for said horse, and that defendant, disregarding his promises and undertakings aforesaid and contriving to injure and defraud said plaintiff, deceived said plaintiff in this: That said horse was not sound and was wind broken at the time of making of said promise by defendant as aforesaid—whereupon plaintiff returned said horse to said defendant, and said defendant took and received back

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the said horse, and plaintiff says that afterward defendant delivered plaintiff another horse in lieu of said first-mentioned horse so returned to him, and, defendant again disregarding his said promises and undertakings, said last-mentioned horse was not sound and was unable to get out of its stall without help and was defective and absolutely worthless, that plaintiff returned said last-mentioned horse to defendant and defendant accepted same back, that plaintiff thereupon demanded defendant to provide him with another horse which was sound and all right in every way or repay him the sum of $75 so paid by plaintiff for said horse according to said promises and undertakings, but said defendant has not delivered said plaintiff any horse as promised by him and as undertaken by him to do or repaid the said $75 aforesaid, and therefore he brings suit."

It appears that later, and during the argument of the case, the following occurred:

"*Plaintiff's Counsel:* I desire to amend the declaration in this case to correspond with the proofs to put in damages for the breach.

"*Defendant's Counsel:* The case was not tried upon that theory at all, your honor.

"*Plaintiff's Counsel:* Yes, sir; it has been so tried. Now, I think it would hardly be fair to be deprived of that on account of the declaration varying somewhat from the proofs. I desire at this time to offer an amendment that would cover it. It could not work any hardship upon the defendant. I move to amend the declaration in the case to contain the following:

"'And whereas heretofore, to wit, on or about the 7th day of June, 1911, at the township aforesaid, in consideration that the plaintiff would buy from him (the said defendant) a certain horse at and for the sum of $75, he (the said defendant) then and there undertook and then and there faithfully promised and represented that said horse was sound and all right except that both eyes were blind. And that said plaintiff, relying upon said representation so made as aforesaid by the said defendant, purchased said horse for the sum of $75 and paid the said sum of $75 to the said defendant, relying upon said representations and guaranty of said horse so made as aforesaid. But that in truth and in fact the said horse was not sound and all right

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except as to both eyes being blind but was otherwise defective and unsound and not all right in the fact that said horse was wind broken and absolutely worthless for the purpose for which the said plaintiff was buying said horse. By reason of which representations and the breach thereof the plaintiff has suffered great damage, to wit, $100.'"

This amendment was allowed over the objection and exception of defendant's counsel.

In its charge to the jury the court, among other things, said:

"Now, if you find in accordance with the claim of the plaintiff that the defendant warranted this horse to be sound in wind, and that it was not sound in wind (and that is the only fault which was alleged against the horse), if you find that the defendant warranted this horse to be sound in wind, and the plaintiff, relying upon that warranty, took the horse and discovered that it did not meet the requirements of the contract and returned it to the defendant, and that the defendant accepted it and turned over to him another horse to try out, and that he later returned this horse as not meeting the requirements, then the defendant would be liable upon his warranty and must respond to the plaintiff in such sum as the plaintiff has suffered by reason of this breach of warranty. Now the damages under the declaration which he would be entitled to recover would be: The difference between the value of the horse at the time he accepted it (that is, at the time of the bargain), the actual value of the horse, and what it would have been worth had the horse been as warranted. The plaintiff claims that such a horse would have been worth $125; that he gave $75 for it; and that he is entitled to get his money back and the profits."

The jury returned a verdict for the plaintiff in the sum of $125, and judgment was entered accordingly, with costs of suit. The defendant has brought the case here upon writ of error, and the assignments of error are as follows:

(1) That the court erred in permitting the question asked of the witness Isaac Stanton, above quoted, to be answered.

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(2) That the court erred in its ruling, above quoted, following the question of defendant's counsel: "What do I understand, then, that their position is?"

(3) The court erred in permitting plaintiff's attorney, in his argument to the jury, to use without correction the remark above quoted concerning the witness Chavaneau.

(4, 5) The court erred in permitting the amendment that was allowed at the close of the testimony in the case, against the objection and exception of defendant's counsel, after admitting that there was no declaration on file in the cause.

(6) That the court erred in instructing the jury that the measure of damages in the action would be the difference between the value of the horse at the time plaintiff accepted it and what it would have been worth had the horse been as warranted, and that plaintiff was entitled to get his money back and the profits.

(7) The court erred in allowing the jury, under the testimony, to find a verdict for more than the sum paid by plaintiff for the horse, together with interest.

We will consider these assignments of error in their order.

(1) The question asked of the witness Stanton was objected to as incompetent and immaterial. In his brief defendant's counsel insists that it did not appear that the witness Stanton was qualified to speak upon the subject of the value of this second horse; that it was not shown that he knew the value of horses. We do not deem this testimony very material, as it had to do with the second horse which the jury must have found was returned to, and accepted back by, the defendant. We think, however, that defendant's counsel should be limited to the objection stated upon the trial, and we cannot say that the evidence was either incompetent or immaterial. We are of opinion that the court did not err in overruling the objection.

(2) As we have already stated, the ruling of the court here complained of was simply the statement of

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the position and claim of the plaintiff, and the ruling was not excepted to by defendant's counsel, and therefore no question is presented to us upon this subject.

(3) The record does not disclose that the attention of the court was called to the argument of plaintiff's counsel with reference to the witness Chavaneau. The court was not asked to rule upon the matter, nor was its attention called to it by any request to charge. Under our repeated decisions no question is here raised for our consideration.

(4, 5) These assignments of error deal with the ruling of the court permitting the filing of the amendment to the declaration. An examination of the record shows that the case was tried upon the theory that the plaintiff had returned the blind horse because it did not comply with the warranty claimed; that plaintiff claimed the horse was worthless and was accepted back by the defendant; and that the plaintiff had suffered damages by reason of the breach of the contract. No objection appears to have been made to the introduction of this evidence. The plaintiff had testified, both upon direct and cross-examination, that had the horse been as represented it would have been worth the sum of $125. This question was submitted to the jury. Our statute of amendments (3 Comp. Laws, section 10268) is very broad and in the furtherance of justice has been liberally construed by this court. There was no request to postpone the case because of this amendment, and we think that under the circumstances such amendment was permissible. *Garnsley* v. *Boyce,* 158 Mich. 8 (122 N. W. 371).

(6, 7) We find no error in the charge of the court and are of opinion that the rule upon the subject of the measure of damages was properly stated to the jury.

Counsel for appellee urges that the assignments of error relating to the charge of the court should not be considered by us because no exception was taken

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by appellant's counsel. Counsel has evidently overlooked our statute (section 10247, as amended by Act No. 52, Public Acts of 1901, 5 How. Stat. [2d Ed.] § 12960), which permits assignments of error upon the charge of the court, and upon refusals to charge, without taking exception thereto in the trial court.

A question argued by appellant's counsel in his brief but not covered by any assignment of error seeks to raise the point that the verdict and judgment, being for $125, exceed the *ad damnum* clause in the amendment to the declaration, which states plaintiff's damages to be $100, and that for this reason the judgment is erroneous. Bearing in mind that this case originated in justice's court, and that the return of the justice shows that plaintiff's damages were claimed to be $150, that the amendment allowed was simply an amendment to the declaration, and not a new amended declaration, and that the question of the amount of the *ad damnum* clause was nowhere called to the attention of the court, but that the trial proceeded on the theory that the plaintiff was entitled to recover his damages by reason of the breach of the contract of warranty under which his damages had been claimed to be $125 at least, and that such excessive judgment would at the most merely be erroneous, there being no assignment of error upon the subject, we must decline to pass upon that question.

Finding no reversible error in the record, the judgment of the circuit court is affirmed.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, OSTRANDER, and BIRD, JJ., concurred.

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NICHOLS *v.* BURCHAM.

1. PARTNERSHIP — EVIDENCE — EXISTENCE OF RELATION — SPECIFIC PERFORMANCE.

   Evidence that two brothers owned and dealt in certain lots jointly, that one of them gave to complainant a written option on the joint property, that the brothers advertised as Burcham Brothers, and had stated that they were partners and that they in fact had some business transactions as partners, the copartnership relation not being denied by them on the hearing, *held*, to sustain a decree finding the existence of a partnership.

2. SAME — REAL PROPERTY — POWER OF ONE COPARTNER — VENDOR AND PURCHASER—OPTION.

   When the partnership business is to deal in real estate, one of the firm has power as agent for both to execute a contract to convey the joint realty, but it is necessary to show that they had dealings in the land and that the property included in the contract was a part of the property so dealt in.

3. FRAUDS, STATUTE OF—RECEIPT—MEMORANDUM.

   A receipt for money paid on the purchase price of land is insufficient as evidence of an executory agreement to sell the land, when it fails to state the times of payment of the unpaid balance.

   MOORE, BROOKE, STONE, and OSTRANDER, JJ., dissenting.

Appeal from Iosco; Connine, J. Submitted November 18, 1912. (Docket No. 61.) Decided November 3, 1913.

Bill by Roland A. Nichols against John Burcham, Albert Burcham and Mott Hicks for the specific enforcement of a contract to convey land. From a decree for complainant, defendant Hicks appeals. Affirmed by an equally divided court.

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Edwin Rawden, for complainant.

Albert W. Black and *L. G. Da Foe,* for defendant Hicks.

BIRD, J. The complainant began this proceeding to have a land contract made with defendants Burcham specifically enforced, and to enjoin proceedings at law. The chancellor who heard the case made a decree agreeable to the prayer of the bill, and defendant Hicks has appealed. The land in question consists of 83 acres bordering on Long Lake in Iosco county. The real contest is between the complainant Nichols and defendant Hicks. It appears that both of these parties were nonresidents of the State, and that they began to bargain for the land at about the same time. The title to the land was held by defendants John and Albert Burcham as cotenants. John was living on the premises and Albert was in Illinois. On May 8, 1909, John Burcham gave complainant a written option in the name of Burcham Bros., to purchase the same for $1,000; a payment of $10 being made thereon. This option was duly recorded with the register of deeds for the county of Iosco on the 18th day of May, 1909. On the 19th day of May a land contract was executed by John Burcham in the name of Burcham Bros., agreeing to sell the land to complainant for $1,000, $250 to be paid down and the balance to be paid on or before the 8th day of November, 1909. The down payment was made by the complainant and the land contract recorded in the office of the register of deeds on the 21st day of May, 1909. On or before the day fixed in the contract for the final payment, the complainant made an effort to pay the balance due on the contract, but was unable to do so on account of the absence of the Burchams. The complainant took possession of the premises under his contract, and later a suit in ejectment was commenced against him

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by Hicks, to recover possession of the same. Complainant then filed this bill to enforce his contract, and also to enjoin the prosecution of the ejectment suit.

Defendant Hicks' side of the controversy is that on the 3d day of May, five days before the option was given to complainant, John Burcham gave him a written option of purchase of the same premises, with certain lumber thereon for $943, on which he paid him $10. On May 22d John executed a deed of his interest in the premises to him, and on June 14th Albert did likewise, and Albert received one-half of the consideration on June 1st and John received his share on June 14th. It is the claim of the complainant that the defendants Burcham were copartners dealing in lands, and that the execution of the option by John Burcham in the name of the partnership was valid, and that the defendant not only had actual notice that he had made a contract for the purchase price of the land, but that he had constructive notice because of the fact that both the option and the land contract were on file in the register of deeds' office for several days before he made any substantial payment upon the land. The defendant Hicks denies that the Burchams were copartners, and that if they were, the land was not copartnership property, and he denies that he had any actual notice before he purchased that complainant was negotiating for the land. For the purpose of establishing a copartnership between John and Albert Burcham, proof was made that the land was conveyed to them as cotenants, and that they either had it surveyed into lots, or contemplated doing so, and that they established an office on the premises for the sale of them. Upon this office building a sign was placed reading as follows: "Burcham Bros. General and Outing Lots for Sale."

The proofs also showed admissions by each one of the partners that he was in partnership with his

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brother in the ownership and sale of these lots. It also appeared that they had entered into some business transactions as partners. The testimony tending to establish the partnership was not disputed by the proofs. No light was thrown on the questions by either one of the Burchams, as neither defended nor did either appear at the hearing. The testimony fairly leads to the conclusion that John and Albert were copartners as to this land.

The more serious question is, however, whether, having established the fact of copartnership, the sale of the land made by John in the firm name was a valid sale as to his brother Albert. To show that John and Albert were partners would not establish the validity of the option as to Albert, unless it was further shown that the copartnership was dealing in lands, and that the lands in question were part of them. *Rovelsky* v. *Brown & Smith*, 92 Ala. 522 (9 South. 182, 25 Am. St. Rep. 83); *Ludlow* v. *Cooper*, 4 Ohio St. 1; *Frost* v. *Wolf*, 77 Tex. 455 (14 S. W. 440, 19 Am. St. Rep. 761); *Moderwell* v. *Mullison*, 21 Pa. 257; *Chester* v. *Dickerson*, 54 N. Y. 1 (13 Am. Rep. 550); *Thompson* v. *Bowman*, 6 Wall. (U. S.) 316; *Batty* v. *Adams County Com'rs*, 16 Neb. 44 (20 N. W. 15); *Robinson* v. *Crowder*, 4 McCord (S. C.), 519 (17 Am. Dec. 762); 1 Bates on Partnership, §§ 298, 299; 17 Am. & Eng. Enc. Law (1st Ed.), p. 960. See, also, *Moran* v. *Palmer*, 13 Mich. 367.

In *Rovelsky* v. *Brown*, *supra*, wherein the facts were very similar to the case under consideration, the rule is stated as follows:

"'When the partnership business is to deal in real estate, one partner has ample power, as general agent of the firm, to enter into an executory contract for the sale of real estate.' *Chester* v. *Dickerson*, 54 N. Y. 1 (13 Am. Rep. 550). 'When real estate is brought into the partnership business, it is treated, in equity, as personal estate, and a lease of it by one partner is

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as much a partnership transaction as a sale of partnership goods by him would be.' *Moderwell* v. *Mullison*, 21 Pa. 257. When land is purchased to be dealt in as a commodity, this would seem to be, for the purposes for such dealing, an out and out conversion of it into personalty, and each partner can bind the firm by contracts for its disposition. *Ludlow* v. *Cooper*, 4 Ohio St. 1; *Olcott* v. *Wing*, 4 McLean, 15 [Fed. Cas. No. 10,481]; *Pugh* v. *Currie*, 5 Ala. 446; *Frost* v. *Wolf*, 77 Tex. 455 [14 S. W. 440, 19 Am. St. Rep. 761]; 1 Bates on Partnership, §§ 298, 299. Our conclusion is, that partnership real estate is, in equity and for partnership purposes, to be treated as personalty; and that one member of a partnership, engaged in the business of buying and selling real estate, can bind the firm by contract in the firm name for the sale of partnership land, and that such contract should be specially enforced against all the partners. This conclusion does not involve a disregard of the rule laid down in *Lang's Heirs* v. *Waring*, 25 Ala. 640 [60 Am. Dec. 533]; for the conversion into personalty is only so far as may be called for to effectuate the purposes of the partnership; and when the partnership has come to an end, and its purposes have been fully accomplished, the real estate resumes its legal characteristics."

It is further said in the same opinion that:

"If the several partners in a firm engaged in the business of buying and selling real estate cannot bind the firm by purchases or sales of such property made in the regular course of business, then, they are incapable of exercising the essential rights and powers of general partners, and their association is not really a partnership at all, but a several agency; the acts of each member being subject to ratification or repudiation by the other members, or by their wives, or, if they should die, by their widows, heirs, or devisees. In short, we are unable to discover any satisfactory reason for denying to a court of equity the power to treat real estate as personalty in order to make binding partnership obligations in reference to the particular subject-matter of the regular dealings of the firm, when that rule sought to be invoked to this end is readily applied to enforce the payment of ordinary

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debts, or to secure a partnership division, which, as compared with the immediate and primary aim of carrying on the regular business of the concern, are the secondary and ultimate purposes to which the partnership property has been pledged or devoted. And authorities are not wanting to support the conclusion that the rule is not confined in its application by any such unreasonable distinction."

Applying this rule in the law of partnership to the proofs in the case at bar, we think it should be held that John Burcham had the authority to make the contract with complainant, and that it should be enforced against both of the partners.

The chancellor found as a fact that defendant Hicks had actual notice of complainant's contract before he paid any substantial sum on his contract. We think this conclusion was justified by the testimony, notwithstanding it was denied by him. In addition to this, had the defendant taken the precaution to examine the records in the register of deeds' office before he paid the purchase price for his deed, he would have been advised of the option and contract executed by John to complainant.

The defendant Hicks makes complaint because he was denied a rehearing. It appears that he was unable at the hearing to produce the written option given to him by John Burcham on the 3d of May. Subsequently it was found and made the basis of an application for a rehearing. The application was denied by the court because of the apparent lack of good faith in failing to produce the option on the hearing. The receipt reads as follows:

"LONG LAKE, IOSCO COUNTY, MICHIGAN,
"May 4, 1909.

"Description of land purchased of John Burcham and Albert Burcham by Mott Hicks: Beginning thirty-two (32) rods north of the southeast corner of section five (5), thence west to Little Long Lake, then west along said lake and west side of town four (4),

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then north to D. & M. Ry., then to lot three (3), then east to two hundred and fifty (250) feet, then north to Big Long Lake, then east along Big Long Lake to section line of section four (4), then south to point of beginning, all lands being situated in lot thirty-eight (38) of section five (5), town twenty-three (23) north of range five (5), east, containing eighty-three (83) acres of land more or less. Received ten dollars ($10) to apply on purchase price of said land, purchase price being nine hundred dollars ($900).

[Signed] "JOHN BURCHAM."

If we were disposed to disagree with the chancellor as to defendant's right to a rehearing, it would be without profit to the defendant, as we are persuaded that the receipt is not sufficient to meet the requirements of the statute of frauds, in that it fails to fix a time when payment should be made. *Gault* v. *Stormont*, 51 Mich. 636 (17 N. W. 214); *Ebert* v. *Cullen*, 165 Mich. 75 (130 N. W. 185, 33 L. R. A. [N. S.] 84), and cases cited.

The decree, canceling defendant Hicks' deed, and providing for a specific performance of complainant's contract, was a proper one, and it will be affirmed, with costs of this court to complainant.

STEERE C. J., and MCALVAY and KUHN, JJ., concurred with BIRD, J.

OSTRANDER, J. *(dissenting)*. I think there is no testimony warranting the conclusion that the land in question was partnership land. Undoubtedly tenants in common of land who agree to plat it and sell it in parcels have each an interest in each parcel and in the proceeds of its sale. In common speech, they are partners in the matter; that is, are jointly interested. If the tenants in common happened to be brothers, it would be natural to advertise the property for sale, as was done in this case. The brothers carried their bank account in their joint names; that is, in the name of John and Albert Burcham. John Burcham,

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who executed the contract under which complainant claims, did not assume the rights of a partner in making the contract, except upon the suggestion of complainant. In view of the opinion of Mr. Justice BIRD, it is proper to set out the testimony presented on the part of complainant upon the subject of a partnership in this land. He drew the original option. At the time he drew it, John Burcham had agreed, not so that his agreement could be enforced, but had given his personal promise in writing, to sell the land to defendant.

As stated, complainant drew the original option taken by himself. When it was offered in evidence, certain changes and interlineations were called to the attention of the court, as follows:

"The option notified complainant that land was owned jointly. I desire to call the court's attention to it. The words, 'I, John Burcham,' in the first line is crossed out and after the word 'Burcham' in the third line it says, 'Brothers,' which was inserted in there after original option had been made, whatever time that might be. Also that original option, as originally drafted, did not contain the words 'Said farm belonging jointly to Burcham Brothers, partners.' It was inserted in there after the original option was drawn, whatever time that might be. That notified complainant of the joint ownership."

Thereupon complainant testified:

"*Q.* Attention has been called to certain interlineations in original option; who made those?

"*A.* They were made by myself before signing by either, and after I read over all the corrections; we were in a hurry and did not have time to recopy it before both signing."

Complainant further gave testimony as follows: On direct examination:

"*Q.* Now, in your conversation with John Burcham, what, if anything, did he say as to he and his brother being in partnership in regard to this land?

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"*A.* He said they were partners. * * * This conversation occurred when I first looked over the farm, and was again repeated on the cars in the presence of Mr. Crary, as to partnership and his authority to make sale. * * *

"*Q.* State as near as you can the conversation that you had on this 19th day of April [the day the contract was presented to John for execution].

"*A.* He passed the time of day. I said I had been watching for him. He was not at home when I got there. He said: 'Well, I don't know about this; I don't know.' I said: 'I am prepared to carry out my part of the option.' Then he said: 'Well, my brother is not willing; I have seen my brother, and he is not willing.' I said, 'Well, you are a partnership, and you did the business for the firm, and I am prepared to carry out my part of the agreement for the land contract, and I shall expect you to.' "

On cross-examination, he testified as to what took place before the option was given:

"*Q.* At that time he told you that he and his brother owned this land jointly?

"*A.* He said they were partners.

"*Q.* Answer my question.

"*A.* Yes, sir.

"*Q.* At this time he told you that he and his brother owned this land jointly? Answer that, 'Yes' or 'No.'

"*A.* I have not enough knowledge of law to know whether jointly or a partnership or both.

"*Q.* Did he tell you in this conversation that he and his brother owned that land jointly?

"*A.* I think he did. I do not recall exactly the words in which he stated it.

"*Q.* At that time you had not made any examination of the records?

"*A.* No, but before I did anything farther, I investigated the title and found that record title showed that land belonged to John Burcham and Albert Burcham. There was nothing stated in the deed showing they were copartners. I knew what the record title showed before I did anything farther."

As to what took place at the time the land contract was executed:

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"Q. In that conversation he said to you then and there that he did not know about selling this land to you? Answer that by 'Yes' or 'No.' He said to you, 'Don't know about selling this land.'

"A. He said, 'I don't know about selling this; I don't know what to do.'

"Q. Did he or did he not make such a statement?

"A. He said, 'I don't know about this.' Yes.

"Q. Now, I want a direct answer to my question, and don't want you to be evasive; he told you in that conversation, 'I seen my brother, and he is not willing to sell the land?'

"A. Yes. We remained out by the fence until Mr. Rawden and Mr. Ballard came up with the boat.

"Q. Now, in that conversation with Mr. Burcham you told him that he did have a right to sell that land for his brother, whether he was willing or not?

"A. Is that a question?

"Q. Yes.

"A. I told him that he would if they were partners; he had the right, or the agent, to sell that land, as a partner.

"Q. To sell the land whether the brother was willing or not?

"A. To sell the land.

"Q. Didn't you tell him whether his brother was willing or not?

"A. I don't recall.

"Q. You don't know whether you did or not?

"A. I told him he was the agent, and he was doing business for the partnership, and he would have the right under the option to sell the land.

"Q. Did you in that conversation tell him that he had that right, whether his brother was willing or not; answer that 'Yes' or 'No.'

"A. I don't recall exactly the words. * * *

"Q. So that you did have a knowledge that there was some unfairness or some weakness in closing up the deal before you had it closed up?

"A. Yes.

"Q. When did you first learn of that unfairness?

"A. By the look of Mr. Eymer's letter head sent me by Burcham.

"Q. Where is that letter?

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"*A.* I have it in the files somewhere unless you (meaning Mr. Rawden), have it.

"*By Mr. Rawden:* I don't think I have it. That was a letter from John Burcham. The first one reached me at Hiram within two or three days after leaving Michigan. I should say three or four days after obtaining option.

"*Q.* Then you received a communication from Mr. Burcham in regard to this matter, and that he could not make the deal, as there was some unfairness?

"*A.* He did not say that he could not make the deal, but that he did not want to make the deal, and wanted to give me my money back. The reason he gave for not wanting to make the deal was that he had seen his brother and he did not want to sell.

"*Q.* So that three or four days after receiving this option he notified you that he had seen his brother that owned the land jointly with him, and that he was not willing to sell?

"*A.* Yes.

"*Q.* And that brother was Albert Burcham?

"*A.* Yes.

"*Q.* And you did not see Mr. Burcham personally again until you came here at the date of Exhibit B (the contract)?

"*A.* No, sir.

"*Q.* And he immediately told you then that he had seen his brother, and he was not willing to sell?

"*A.* Yes."

After executing the contract, Burcham, or some one for him, sent to complainant, by express, the $260 he had paid, and complainant refused to receive the package.

Complainant's witness Crary testified:

"*Q.* Did you hear at that time Mr. John Burcham say anything as to whether he and his brother were in partnership as to that land?

"*A.* Yes.

"*Q.* What did he say?

"*A.* Well, now in the first place this was prior to going down on the train.

"*Q.* What did Mr. John Burcham say regarding he and his brother being in partnership in those lands?

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"*A.* He said it on his property first, and afterwards going down on the train. I think it was after we got to the depot.

"*Q.* Was that before the execution of this option, Exhibit A?

"*A.* Yes.

"*Q.* Did you ever hear Albert say anything about the fact of there being any partnership, or not being in partnership, in anything?

"*A.* Not in regard to the land. I did in regard to handling vegetables and stuff on their property.

"*Q.* But you say you never heard Albert say anything in regard to the land?

"*A.* No, sir. * * *

"*Q.* Taking the conversation you had with Albert Burcham in consideration, Albert Burcham never told you at any time that he was a partner of John Burcham in the land business?

"*A.* No, sir. I don't think I ever talked with Albert about it."

Complainant's witness Beedon, who was cashier in a local bank, testified: Direct examination:

"I had a conversation with Albert Burcham regarding this business of theirs at Long Lake and the purchase of that land up there.

"*Q.* Now, what, if anything, did he say to you as to the relation that he bore to his brother in regard to that land? * * *

"*A.* They were partners all the time in their land deals, and generally split the profits, always in all of their deals that they had around town there; they figured around a good deal in farms and lots, and they always split the profits, and Albert—he is a little more simple than the other fellow—he asked me if I thought it was a good deal that they traded their farm for that property at Long Lake. I wasn't much acquainted with the country at that time; I told him I didn't know much about it.

"*Q.* What I want is what Albert said to you in regard to how he and his brother had gotten into that deal at Long Lake, and if they were partners. * * *

"*A.* He told me that they were going to trade for this land and make it into a summer resort, and they

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were going to plat it and sell the lots and each take the profits on what they could sell it for.

"Q. Did he make any statement to you as to whether he and John were partners in the business? * * *

"A. Yes, he did.

"Q. What did he say about that?

"A. Well, he said that they were—that he was trying to get it—when he started they would buy and sell these lots and each take their share. * * *

"Q. What, if anything, did John say as to how he and Albert were in that venture up there?

"A. He said they were going to be partners in the venture. I think he said this after they had gone into it. After they moved up to Long Lake, what little banking they did, they continued to do it in our bank.

"Q. Now, can you give us, as near as you recall it, the conversations or statements that Albert made to you when you say that he stated they were partners in the business?

"A. He made the statement to me that they were going to try and sell these lots and make some money and pay for the rest of the place. It seems to me there must have been a little something back of it. I never asked them, but they wanted too big a price for the lots, or else they would not sell them.

"Q. What, if anything, did he say as to the division of the profits?

"A. Just as much as John—just the same."

Cross-examination:

"I knew Albert Burcham about three years. He was real often in our bank. The conversation I have just related took place after the purchase of the Long Lake property. I can't tell the exact time. It took place in the bank. Don't remember of any one else being present but myself and Albert Burcham. The way he come to tell me, we got talking about the property. John Burcham was not there at that time.

"Q. Now, give us the words, as near as you can as to what Albert Burcham said, not your language, but his.

"A. He said they were going to live up there and move up there and build a shanty.

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"Q. Did he say 'They' or 'We?'

"A. He said 'We,' I think. 'We are going to move up there and have this land surveyed and make lots and sell the lots for outing ground purposes.'

"Q. Now, then, you know as to whether they owned the land at that time?

"A. They had it bought at that time.

"Q. Do you know whether or not they surveyed it or had it platted into lots at that time?

"A. I think not.

"Q. Do you know as to whether they ever had it surveyed into lots?

"A. I think it is.

"Q. Of your own knowledge?

"A. I think they did.

"Q. Do you know of your own knowledge?

"A. I could not swear to it.

"Q. Is that the only conversation you ever had with Albert regarding that land?

"A. I think it is.

"Q. What you have told me just now is all that Albert Burcham said to you at that time regarding that transaction?

"A. No; I would not say that he didn't, because I have probably forgotten something—that is, a part of it. I have known John Burcham about the same length of time, and he did business with our bank. They had at times a little money deposited in bank.

"Q. When did you have a conversation with John regarding the matter?

"A. Before they bought it and after they bought it.

"Q. What did he say in that conversation—his words as near as you can remember?

"A. He came there and asked me if I thought it would be a good deal; that is, if I thought they could make any money, and I told him I could not judge about it because I was not acquainted with that part of the country.

"Q. Then what did he say?

"A. I think he said that he was going to take it up anyway.

"Q. Then what else did he say?

"A. That is all that I can remember of him saying.

"Q. That is the first conversation; now the second conversation. When did you have that?

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"*A.* It was after he had made a deal for the land; I can't tell how long after he bought the land the second conversation occurred. I believe the second conversation occurred at the bank.

"*Q.* Using John's language, what did he say?

"*A.* He said they had purchased that land up there, and they were going to have it surveyed and platted into lots.

"*Q.* He did not tell you at that time that he had had the survey made and the land put into lots?

"*A.* No; he did not.

"*Q.* All the conversation with John was in regard to something that was to be done in the future?

"*A.* Yes, sir.

"*Q.* What else did he say, if anything?

"*A.* I could not think of anything more that he said up there.

"*Q.* Does that contain then, all the statements made by John Burcham to you at that conversation, as near as you can remember them?

"*A.* Yes, sir; it does.

"*Q.* And this second conversation, I take it, was the last conversation that you had with John Burcham concerning the matter?

"*A.* I think it was.

"*Q.* That was all the conversation?

"*A.* Yes, sir.

"*Q.* Then you did not talk with him or with Albert after any arrangement had been made by them to sell these lots, if such arrangements were made?

"*A.* No. * * *

"*Q.* Did John and Albert Burcham have an account in your bank?

"*A.* They had at different times a little money on deposit. The account was in the name of John and Albert Burcham. There was no account in bank placed by either of the Burchams in the name of Burcham Bros."

Complainant's witness Ballard: Direct examination:

"I know John and Albert Burcham. I knew them for about two years before I moved to Long Lake. They did some business in my store. They purchased goods from me and also small fence posts and saw

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logs, after they came to Ellake. (Ellake and Long Lake are different names for the same place.)

"*Q.* During the time that they came into the store, did you have any conversation with either of these men, either John or Albert, as to the relation they bore to each other in that piece of land, or in the business that they were engaged in up there? * * *

"*A.* Only so far as when they were making a purchase or fetching in material that I bought of them, and it would not be paid for at that time, they would wait until either of them came in to pay it up, or occasionally when I bought anything of them I would deduct it until they got ready to settle up. That was the only time that I had any conversation with them in regard to their partnership business or anything of that sort. * * *

"*Q.* Now, what statement did Albert Burcham make to you at any time regarding the relation that he bore to his brother in that land that they had down there at Long Lake?

"*A.* The statement that he made to me was the first time that I had anything much of a talk. I asked him the first time, I said, 'You are Albert Burcham,' and he said, 'Yes, but don't put it down that way; put it down to Burcham Bros. as John and I are partners.' * * *

"*Q.* Now, when he brought logs or fence posts down there (referring to Albert), did he at any time make statements when he brought any such forest products, regarding any relations that he bore to his brother and this land? * * *

"*A.* I could not say that Albert personally did. I don't think that Albert himself fetched me any timber at any time. When there was anything of that sort John generally attended to the timber end of it."

On cross-examination:

"Albert Burcham never told me anything about any relations which existed between him and John, except when he came and got goods in the store and stated to me that he got it for Burcham Bros. in that they were partners. They were living together at that time. I let them have some things out of the grocery store, such as groceries and clothing, that would be likely to be used by both parties; also tools and saws.

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* * * At no time was there a general discussion entered into by me with these parties as to their exact relation, so far as this piece of property is concerned; in other words, we did not enter into private affairs, and I did not ask them about where they stood in regard to this piece of property, except as is stated in conversation above referred to, and these conversations took place at the store with Albert Burcham. Albert Burcham never afterwards talked with me about any partnership existing between him and John as regards this piece of land. John talked to me about the partnership business in the property along that same winter; I think it was in the winter of 1908. He was in the store three or four times a week.

"Q. What did he say?

"A. When I seen him, in particular that I remember, he was there with a load of logs, and he wanted me to go down and scale them, and I took the scale sheet down there and he stood and looked over my shoulder as I wrote the scale down on the sheet, and I wrote 'John Burcham,' and he corrected me and he said the logs—that is, partnership—it is 'Burcham Bros.,' in that way.

"Q. That entire matter referred to the timber that had been cut by the two boys, the two Burcham boys, and necessarily would be a partnership matter?

"A. Yes.

"Q. That did not refer to the matter of the land in any way, did it?

"A. That didn't as I know of, any more than that the logs came off the land.

"Q. What other time did you talk with him regarding the matter?

"A. It was common conversation in regard to their business. I could not tell you the dates. The next time that directed my attention that John Burcham said anything to me about the partnership relation to this land was when I made a trade with John for a lot he had in Hale, and he was trading some stuff at the store, and he bought a whole lot of stuff, and I made a trade with him, and he said, 'I will fetch up Albert and see if he is satisfied,' so him and Albert came up that night, and he closed the deal.

"Q. He did not tell you then that he was trading

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you that lot down there, or sign 'Burcham Bros., by John Burcham,' and Albert not come near it?

"*A.* No, sir. He did not tell me that. Albert came up to look the situation over with John."

Complainant's witness Hadwin, as to what occurred when the contract was executed:

"The conversation that I heard between Mr. Nichols and Mr. Burcham about this contract was that Mr. Nichols said that he came there to make that payment on the property, and Burcham said: 'Well, I don't know about that; my brother is not here.' Mr. Nichols said: 'Well, you are agent for your brother in this business'—and he said: 'Yes, sir.' 'Well,' he said, 'You can sign it yourself. You are acting as his agent.'"

This is, I think, all the testimony of witnesses upon the subject of the partnership. In addition, it appears that upon the land were signs advertising the fact that outing lots were for sale by Burcham Bros., and upon a building of one room, upon the land was a paper sign bearing the words, "Burcham Bros. General and Outing Lots for Sale." I conclude there was no proof of a partnership agreement of the Burchams with respect to the land; none that it was purchased by them with partnership funds; none that Albert Burcham ever held his brother John out as his partner with respect to the lands, or that either, except in the particular matter, ever assumed to deal with the lands as partnership property. It is clear, I think, that John Burcham never supposed that he was in fact the partner of his brother, entitled, by virtue of their agreement, to make contracts with respect to the sale of the land. The suggestion came from complainant, who assumed, upon the facts disclosed to him, to advise him that he had the right to make the option, and later advised him that he had the right to make the contract. The land was not sold in parcels, but as an entirety. Complainant was notified when he had but $10 invested that John Burcham

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wished to withdraw the option. On the other hand, the defendant Hicks, apparently in good faith, accepted from John Burcham, on May 4, 1909, four days before complainant received his option a memorandum, set out in my Brother BIRD'S opinion. Pursuant thereto there was executed a deed of the land by both John and Albert Burcham. The deed is dated May 15, 1909, but was actually acknowledged, by Albert, in Illinois, May 22, 1909, and by John, in Michigan, June 14, 1909. Defendant Hicks paid the purchase price, and personally took possession of the land. He was evicted in June, 1909, by an agent of complainant, who had not then paid the balance of the purchase money on his contract, and has never paid it, and to whom the money he had paid was before then attempted to be returned. Complainant is entitled to no particular sympathy or equitable consideration. He determined for himself that the land was partnership land, and that John could bind the partnership by his agreement. He stood, and stands, upon a strict legal right. He must establish the fact that the land was partnership property or must fail. My own reasons for concluding that he has not done so sufficiently appear. I think it will be a distinct departure in the law if it is held that the evidence is sufficient to prove a partnership agreement with respect to this land between John and Albert Burcham, or that the land was purchased with partnership funds, or that Albert Burcham or John Burcham ever held himself or his brother out as such a partner.

The decree should be reversed, and one should be entered granting the relief prayed for in the cross-bill, with costs of both courts to defendant Hicks.

MOORE, BROOKE, and STONE, JJ., concurred with OSTRANDER, J.

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NYE *v.* FONGER.

CANCELLATION OF INSTRUMENTS—LIFE ESTATE—DEEDS—CONTRACTS—CONSIDERATION.

Although the finding of the circuit court in chancery that the defendants obtained a valid title to complainants' farm by a deed conveying the land subject to a life estate in complainants and in consideration of their support upon the premises, is affirmed, the decree should be modified so as to permit complainants, at their election, to waive the right to support on the premises, retaining the use thereof as life tenants.

Appeal from Genesee; Wisner, J. Submitted October 9, 1913. (Docket No. 11.) Decided November 3, 1913.

Bill by Norton B. Nye and Sarah C. Nye against Marshall J. Fonger and Mary T. Fonger for cancellation of a deed. From a decree for defendants, complainants appeal. Modified and affirmed.

Thompson & Temple (D. S. Frackelton, of counsel), for complainants.

Roy E. Brownell, for defendants.

OSTRANDER, J. Defendant Mary T. Fonger is the niece of complainant Sarah C. Nye. To the Fongers the Nyes made a deed of certain premises in May, 1910, reserving to themselves a life estate. The deed was taken by Mrs. Fonger, and was recorded in April, 1911. Complainants, seeking to set aside and cancel the deed, charge that no consideration was received by them for the conveyance; that it was obtained by fraud; that undue influence was exerted by defendants in procuring it; that neither of the grantors un-

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derstood the legal effect and consequence of their action, and that the deed was made with the distinct mutual understanding and agreement that it should not be recorded during the life of the grantors; and that they might, if they desired to do so, mortgage the premises conveyed to obtain money for their use. The defendants deny that fraud was practiced or undue influence exerted by them, deny that the grantors (complainants) did not fully comprehend the nature and effect of the deed, say that it was executed by the grantors voluntarily, in payment for past kindness and care, and in payment for future care, kindness, and attention which they are ready and willing to afford. They offer, if complainants will return to the premises in question, which defendants occupied when the deed was made and still occupy, to furnish complainants with a good home, proper care and attention and maintenance in a manner suitable to their station in life. The bill of complaint was filed June 23, 1911. Upon the hearing a decree was entered, dismissing the bill, with a finding that as a part consideration for the execution and delivery of the deed it was agreed by the parties thereto—

"That said complainants should be furnished by said defendants a comfortable support so long as said complainants and each of them should live, and at their death that said defendants should afford them and each of them a decent burial; that such support should be in accordance with their circumstances and station in life, and such as the complainants have heretofore been accustomed to, and that such support should be furnished at the farm hereinbefore described and in the home of defendants thereon."

Pursuant to this finding the decree provides that defendants shall so maintain complainants, etc., and give to complainants a lien upon the premises as security for performance of the decree. At the hearing the court stated that performance of the parol contract of the parties could be decreed only because de-

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fendants had in open court admitted and agreed to perform their undertaking, and the solicitor for complainants suggested to the court that it would be better if the amount defendants should pay was fixed by the court.

There are various minor propositions and issues of fact raised by the pleadings, but a recital of them and an analysis of the testimony would profit no one. Upon the main issue we are satisfied with the conclusion of the court below. That is to say, we think it is not made out that the deed was unfairly procured, or that it was not intelligently executed and delivered. But the deed reserves a life estate to complainants, and in their bill they do not assert the parol contract and agreement with defendants found by the court, and to which the decree gives effect. Enforcement of this provision of the decree involves the possession by defendants of the premises in question, which it is needless to say is apparently inconsistent with a life use thereof by complainants. Complainants, without expressly waiving any benefit which performance of the decree may afford them, complain that it creates contractual relations, and forces complainants to accept them. We are satisfied that the parol agreement was made, and that it was contemplated that in performing it on their part defendants should possess the premises. It is an agreement involving in a large degree the personal comfort of complainants, and the death of either of defendants would, or might, make complete performance impossible, while a change in their mental attitude towards complainants would, or might, take away the very consideration for making such an agreement. Assuming that the provision for a life estate was merely a safety device intended to secure complainants in any event a home and the fruits of the farm, it is evident, we think, that complainants should not be refused the right, at their election, to possess the land, and that, if they so de-

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sire, the decree ought to be modified accordingly. They may, within 30 days after the handing down of this opinion, upon notice to defendants, take a decree in this court affirming the decree of the court below, with the modification that at their election they may possess, use, and enjoy the premises as life tenants, in which case the agreement for their maintenance and support by defendants shall be held to be waived, and no costs of this appeal will be awarded to either party. Otherwise a decree will be entered affirming the decree below, with costs to appellees.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and BIRD, JJ., concurred.

GRIFFIN *v.* GRIFFIN.

DIVORCE — CONDONATION — ADULTERY — HUSBAND AND WIFE — INSANITY.

It is a fair inference, from the fact that complainant waited five years before filing a bill for divorce on the ground of adultery, during which time the wife became insane, that he had condoned the offense so as to bar equitable relief, the question whether defendant was irresponsible when she committed the offense being also in doubt.

Appeal from Muskegon; Sullivan, J. Submitted October 10, 1913. (Docket No. 21.) Decided November 3, 1913.

Bill by Frank B. Griffin against Gertrude F. Griffin for divorce. Ida Evans was appointed guardian *ad*

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litem. From a decree for complainant, defendant appeals. Reversed.

Edward McNamara, for complainant.

Sutherland, Johnson & Sessions, for defendant.

OSTRANDER, J. It is charged in the bill that defendant committed adultery in the city of Cadillac, Mich., February 28, 1907, and before and after that time. It is further charged that defendant was committed to the Northern Asylum for the Insane as an insane patient April 9, 1909, and discharged therefrom October 11, 1911; that "at the time when said defendant committed adultery as related in paragraph 6 of this bill, she was in her right mind and sane." It is charged that two children, offspring of the marriage, born, respectively, in June, 1903, and in November, 1904, are living, and that there was born to defendant about November 30, 1907, a child, of whom complainant says he has always believed he was not the father, although he is unable to say whether he is or is not the father. It is charged that the parties lived and cohabited together until on or about February 20, 1907. The bill was filed February 2, 1912. We infer that a guardian *ad litem* was duly appointed for defendant; this because the record discloses that she answered the bill by her guardian and no question is raised as to her authority.

The answer sets up, among others, the following facts: Defendant was returned to the Asylum on or about March 5, 1912; her release therefrom in October, 1911, being temporary. Upon information and belief, the charges of adultery are denied, with the statement that if the act expressly charged was committed, defendant was irresponsible, and if it was committed, it was condoned and forgiven by complainant, who has since lived with her as his wife with knowledge of the fact. The cause was heard in open

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court, and a decree was entered dissolving the marriage. Custody of the two older children was given to the father and mother of defendant, with certain restrictions and conditions, and complainant is ordered to pay $4 weekly for their support, maintenance, and education. The third child is not mentioned in the decree. The guardian *ad litem* has appealed.

There was some competent testimony introduced tending to prove that defendant is guilty of the offense with which she is charged; that, at least, she corresponded, sexually, with a man not her husband. If she was responsible for her conduct, the offense is fairly proven. As to her responsibility the testimony leaves us in doubt, and in much greater doubt about complainant's subsequent conduct. This doubt is so considerable that after admitting the advantage afforded to the lower court by seeing and hearing the witnesses, we are not satisfied that a cause for divorce has been made out. Complainant waited almost five years before seeking relief. It is a fair inference that he did in fact condone, or excuse, the conduct which he now brings forward as a ground for divorce. The children are directly, and the public is generally, concerned with the matter. The defendant is, apparently, unable to defend herself.

However unfortunate complainant's position may be, we are constrained, after careful reflection, to reverse the decree of the court below and dismiss the bill. Complainant will be required to pay to the guardian *ad litem* a solicitor's fee of $25 and pay the cost of printing the record and briefs.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and BIRD, JJ., concurred.

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WEILAND *v.* HOGAN.

1. CORPORATIONS—STOCK AND STOCKHOLDERS—ESTOPPEL—BY-LAWS—VALIDITY.

Stockholders who have participated in the enactment of a by-law which requires them to offer their stock to other stockholders of the corporation and to the corporation before selling the same, and providing for a period of six months in which the offer might be accepted, are estopped from questioning the validity of the by-law.

2. SAME—SPECIFIC PERFORMANCE—DECREE.

Where the by-laws of a corporation provided that no transfer of stock certificates should be made by any stockholder without first making a written offer of sale of such stock to the corporation and its stockholders, by affidavit, etc., and, if the company refuse to purchase, the stockholders to have six months in which to accept or reject the offer, a decree in injunction proceedings requiring the defendants to sell to complainants all the stock included in a prospective sale or at their election such part as the complainant stockholders offered to take as their *pro rata* share, was just and equitable.

Appeal from Wayne; Codd, J. Submitted January 13, 1913. (Docket No. 96.) Decided November 4, 1913.

Bill by Frank Weiland and others against Morris P. Hogan and others for an injunction and other relief. From a decree for complainants, defendants appeal. Affirmed.

Prentis & Mulford, for complainants.

Navin, Sheahan & Kennary (Arthur C. O'Connor, of counsel), for defendants.

Complainants and defendants together constitute all the stockholders in a corporation known as the

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Monarch Foundry Company. The corporation was formed in 1907.

At the first meeting of the stockholders, the following by-law was unanimously adopted:

"No transfer of stock certificates on sale shall be made until an offer of sale to the company shall first be made in writing, and the company shall then have six months from date of said notice to accept or reject same, at appraised value, by appraisers appointed by company and seller."

And printed upon each stock certificate was the following:

"This certificate of stock is transferable only when the conditions of article 9 of this company's by-laws have been complied with."

Several transfers of stock were made in accordance with this by-law.

On August 28, 1911, when all the parties to this cause, together with Frank Walker and Frank Rivard, were stockholders, the following by-law, which superseded the one above quoted, was unanimously adopted:

"No transfer of stock certificates, of the company by virtue of sale shall be made by any stockholder without first making written offer of sale of such certificate to the company and stockholders, by an affidavit alleging a bona fide offer of purchase of said certificate and the amount offered therefor and the company, or if the company refuses to purchase, the stockholders shall have six months from date of notice to accept or reject same. Said stock to be equally distributed amongst the stockholders desiring the same, said transfer to be made and recorded within two months thereafter."

On October 28, 1911, Walker made an affidavit in compliance with the foregoing by-law, relative to an offer for his stock, and upon November 7, 1911, Rivard made a similar affidavit. Later, and prior to November 16, 1911, defendant Aman purchased

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Walker's 10 shares for $1,200, and Rivard's 15 shares for $2,000.

On November 16, 1911, a special meeting of the stockholders was held which was attended by all the parties to this cause. An extract from the minutes of the meeting shows that:

"The chairman announced that the purpose of the meeting was to take action on the purchase of the stock of Messrs. Rivard and Walker, and the election of a director to fill the vacancy caused by the resignation of Mr. Rivard. The secretary then read the affidavits of Messrs. Rivard and Walker, copies of which are attached to and made a part of the minutes of this meeting. The secretary notified the stockholders that the stock would not be transferred on the books of the company until 60 days had elapsed from the date of the notice. Mr. Aman then notified the company that he had purchased all of the stock of Messrs. Rivard and Walker, and that he was holding same in trust, and that he would assign his interest therein to those desiring same, to the extent that they were entitled to purchase."

On December 26, 1911, complainants gave notice to the corporation that they would take and pay for their proportionate share of the Walker and Rivard stock. On January 10, 1912, a special meeting of the stockholders was held. All stockholders were present, either personally or by proxy. At this meeting a certified check for $1,200 was tendered Aman for the Walker stock, which was refused. Another tender of $1,016 was made for 67/132 of the Rivard stock. Both tenders were refused by Aman, who assigned as his ground for such refusal the alleged fact that the 60-day limit had expired and no tender had previously been made.

Frank Walker, who sold his 10 shares to Aman, testified:

"The by-laws were accepted; they were the by-laws, and the company had always done business under them. When Mr. Aman would not turn over to the

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other stockholders their *pro rata*, I authorized Mr. Robertson, as my agent, to tender $1,200 and interest for the return of my 10 shares of stock. I then considered that I had not sold my stock, because I considered the by-laws created a lien upon it, and that in case the stock was not divided among the stockholders, I could not, and had not, made any sale of it."

Being unable to secure their proportionate share of the stock in question, complainants filed their bil[1] of complaint. They pray for the following relief:

"(2) That a temporary injunction be issued from this court restraining the said defendants Aman, Hogan, and Brown from transferring the said stock, namely, the 25 shares purchased from Walker and Rivard, or from voting the said 25 shares purchased from said Walker and Rivard, or any portion thereof, at any stockholders' meeting of said company; that the said defendant company and its officers be enjoined and restrained from allowing the said 25 shares formerly owned by said Walker and Rivard to be voted at any meeting of the stockholders or to be counted in making a quorum.

"(3) That the defendants Aman, Hogan, and Brown be restrained from transferring said stock, namely 25 shares purchased from said Walker and Rivard, or any portion thereof.

"(4) That the said defendant may be enjoined and restrained from voting said stock, namely, 25 shares purchased from said Walker and Rivard, or any portion thereof.

"(5) That the defendants Aman, Hogan, and Brown be required to permit each of the complainants to purchase from them, at the price paid by them on the purchase thereof, their *pro rata* share of said stock, formerly owned by said Walker and Rivard for cash.

"(6) That the defendant company and its officers be enjoined and restrained from allowing the said 25 shares formerly owned by said Walker and said Rivard, or any portion thereof, to be voted at any meeting of the stockholders, or to be counted in making a quorum."

A decree was entered as follows:

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"(1) That the sale and purchase of said Walker stock and said Rivard stock shall each be treated as a distinct and separate transaction, for the purpose of carrying out the terms of this decree.

"(2) That within five (5) days from the date of this order, each of said complainants, and each of said defendants, by means of a written communication addressed to the Monarch Foundry Company, shall designate the proportion or *pro rata* of stock he desires to purchase of the stock so as aforesaid sold by said Walker and by said Rivard. Noncompliance with said notice to be construed as a desire not to purchase any of said stock.

"(3) That in case any or all of said defendants do not within said five (5) days signify their intention of taking their *pro rata* proportion of said stock, in accordance with said by-law, then said complainants must, within 10 days thereafter, purchase the balance or all of said Walker and Rivard stock, in accordance with the terms of the sales heretofore made, under and by virtue of said by-law.

"(4) That in case said complainants shall not, within said fifteen days, so purchase their *pro rata* share of all of said stock, as required of them, by the notifications to be given by said defendants, then said defendants shall have the right to retain, as and for their own, all of said stock, so as aforesaid heretofore purchased in trust by said defendant Aman.

"(5) That each of said complainants, in purchasing stock, shall pay interest at the rate of five (5) per cent. per annum, upon the amount paid by him; said interest to be computed from the 28th day of October, 1911, in the purchase of said Walker stock, and from the 7th day of November, 1911, in the purchase of said Rivard stock.

"(6) That complainants shall be entitled to costs, to be taxed by them in this cause."

Defendants appeal.

BROOKE, J. *(after stating the facts).* The contention is made on behalf of appellants that this by-law is void for various enumerated reasons. The authorities upon this point are not uniform, and though the

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question is one of interest, we have found it unnecessary to pass upon it in this case, for the reason that, whether valid or void, considered strictly as a by-law, it can be sustained as an agreement entered into between all the parties in interest. It should be noted that we are not called upon here to determine the effect of such a by-law upon a stockholder who had not given his assent to its adoption, or upon a transferee of stock, who in good faith, for value, and without notice, had become an owner of shares in the corporation. We are now dealing only with stockholders who themselves, voluntarily and for their own benefit and protection, enacted the by-law.

A review of the authorities is unnecessary, but attention is directed to the following: *New England Trust Co.* v. *Abbott*, 162 Mass. 148 (38 N. E. 432, 27 L. R. A. 271); *Barrett* v. *King*, 181 Mass. 476 (63 N. E. 934); *Nicholson* v. *Brewing Co.*, 82 Ohio St. 94 (91 N. E. 991, 137 Am. St. Rep. 764, 19 Am. & Eng. Ann. Cas. 699); *Carter* v. *Oil Co.*, 182 Pa. 501 (38 Atl. 571, 39 L. R. A. 100); *In re Lindsay's Estate*, 210 Pa. 224 (59 Atl. 1074); *Garrett* v. *Lawn Mower Co.*, 39 Pa. Super. Ct. 78. For further authorities upon the subject, see 26 Am. & Eng. Enc. Law (2d Ed.), p. 855, and notes; 10 Cyc. p. 358, and cases cited; *Id.*, p. 579; 3 Clark & Marshall on Private Corporations, p. 1728 *et seq.*

Of the appellants in this case it may be said as was said in the case of *Clark* v. *Machine Co.*, 151 Mich. 416 (115 N. W. 416):

"The stockholders are not in position to complain, for they were all willing parties to the transaction and are therefore estopped to deny its validity" (citing cases).

We are of the opinion that the decree is not open to criticism. By its terms appellants are required only to sell to complainants their proportionate share of

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the Walker and Rivard stock, but may at their option dispose of it all. If they so elect and complainants decline to take it all, they may keep it all. We can perceive nothing unfair in these terms.

The judgment is therefore affirmed, with costs.

STEERE, C. J., and MOORE, MCALVAY, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

BALTIC MINING CO. *v.* HOUGHTON CIRCUIT JUDGE.

1. INJUNCTION—MANDAMUS—RESTRAINING VIOLENCE—STRIKES.
   Before applying for the writ of mandamus to require the circuit court to reinstate an injunction against unlawful acts, dissolved upon motion of defendant members of a miners' union, who were engaged in a strike, it was proper practice to apply to the court by motion and by affidavits in support thereof, showing concerted acts of violence and intimidation and praying for a restraining order against the same, where, on dissolution of the interlocutory injunction, the court had expressly reserved the right to issue a restraining order with or without notice.

2. SAME—EQUITY.
   Upon the refusal of the circuit court to issue a restraining order as prayed, based on the alleged ground that it had no power to do so because the bill was deficient, and exercising no discretion upon the showing made, the question for the Supreme Court in mandamus proceedings was one of law.

3. SAME—AFFIDAVITS—CONSPIRACY.
   The bill for an injunction against strikers to restrain existing and threatened violence, intimidation and conspiracy, supported and accompanied by affidavits, must

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be taken as true on a motion to dissolve, in the absence of answers or affidavits denying the averred facts.

4. SAME—DEMURRER—STRIKES—MINES AND MINING.
An injunction bill filed by the owners of several copper mines against the Western Federation of Miners, averring that defendants inaugurated a general strike of its members during the preceding summer, that upward of 4,000 employees of the defendants had refused to participate in the strike and tried to continue their employment but defendants had interfered with them, by force, threats and intimidation, causing them to stop work at the pumps, the mines to partly fill up with water and forcing suspension of work, further setting up the existence of lawlessness, violence, and conspiracy, accompanied by acts of intimidation, and further threatened violent unlawful acts, set forth in detail, and the sending of State troops to restore order, and failure to effect that result, was not demurrable and sustained a preliminary injunction issued upon the showing.

5. SAME—VERIFICATION—AFFIDAVIT—EQUITY PRACTICE.
There was also no ground for the objection that the bill was not properly verified, where seven affiants swore to the facts of their own knowledge "except as to matters therein stated upon information and belief" and the material, essential averments were stated positively.

6. SAME—INSUFFICIENCY—BILL OF COMPLAINT.
General certainty is all that is required in a bill of complaint; it is not necessary to relate all the details.

7. SAME.
In order to justify the issuance of a preliminary injunction, the court need not find that the complainant's rights have been clearly established, or that complainant is entitled to prevail at the hearing; if a substantial question exists, cognizable in equity, and in order to prevent irremediable injury to the complainant it appears to be necessary to prohibit any change in the conditions and relations of the subject-matter or parties, an injunction is warranted.

8. SAME—CONSPIRACY—VIOLENCE—RESTRAINING UNLAWFUL ACTS.
Courts of equity have authority to restrain conspiring labor organizations from molesting by violence, threats and intimidation those engaged in any lawful employment and those who employ them.

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9. SAME—PARADING.

Peaceable meetings or parades permitted under an injunction restraining violence and threats do not include parades near the premises of the working miners so timed as to impede or intimidate them in going to or returning from work, or loitering near the premises of the mines or homes of the laborers, intended to intimidate the men.

Mandamus by the Baltic Mining Company and others against Patrick H. O'Brien, circuit judge for the county of Houghton, to compel respondent to vacate an order dissolving a preliminary injunction. Submitted November 18, 1913. (Calendar No. 25,905.) Writ granted December 10, 1913.

Rees, Robinson & Petermann (Hanchette & Lawton and *Otto Kirchner,* of counsel), for relators.

A. W. Kerr, Le Genrde & Driscoll, and *E. A. McNally,* for respondent.

PER CURIAM. On October 7, 1913, relators filed in this court their petition for a mandamus to the circuit judge of Houghton county directing him to set aside and vacate an order made September 29, 1913, dissolving a preliminary writ of injunction previously granted by him and issued from his court restraining certain acts of violence and intimidation charged in the bill of complaint; also asking in said petition that pending these proceedings this court suspend such order of dissolution and continue said injunction in force. On October 8, 1913, an order to show cause why a writ of mandamus should not issue was granted, returnable November 4th ensuing, and the order of the lower court dissolving said injunction was stayed and suspended *pendente lite,* with the provision that peaceable meeting and parading be not restrained.

The bill of complaint, pursuant to which the temporary injunction in question issued, was filed by re-

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lators in Houghton county against the Western Federation of Miners, a voluntary, unincorporated society known as a labor union, its district and local unions, their officers and members. Said bill, after stating the organization and situation of the parties and averring that a general strike was called and inaugurated by defendants in the copper mining district of Lake Superior, on July 23, 1913; that upward of 4,000 miners in complainants' employ not allied with defendants refused to participate in the strike, and endeavored to continue at work; that defendants by threats and violence interfered with and drove them from their work, stopped the pumps at the mines, causing the latter to partially fill with water, and thus forcing suspension of work in many places; that a condition of violence and lawlessness developed in the district where the strike prevailed beyond the power of the civil authorities to control, resulting in the governor of the State sending there the entire military force of the Commonwealth to preserve order, and protect persons and property, but, nevertheless, the acts of violence, disorder, and intimidation of those desirous of work continued — further charges, amongst other things—

"That from the day of the inception of the said strike the said defendants * * * did unlawfully combine and conspire together * * * with the illegal intent and unlawful purpose and by illegal and unlawful means, to prevent the employees of your orators, and of each of them from working at the mines and other operations of your orators, * * * and to force the cessation of all operations of your orators," * * * and * * * "the said defendants, members of said federation, at the several mines and premises of your orators and in the vicinity or neighborhood thereof, have assaulted and beaten many of the employees of your orators in cases far too numerous to mention or set forth, and that such assaults and beatings, threats of bodily harm, intimidations, violence, and riotous conduct continue daily

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to the time of the filing of this bill" * * * and that members of the said federation "have systematically and do now systematically, unlawfully by threats, intimidations, force, violence, assaults, picketing, threatening parades, riotous and threatening gatherings in large numbers, and by other unlawful means, interfere with and molest and disturb, without authority of law, the mechanics and laborers who are employees of your orators in the quiet and peaceable pursuit of their respective lawful avocations, contrary to the statute in such case made and provided;" * * * and "that in such furtherance of said unlawful combination and conspiracy, the said defendants * * * from day to day, with great force and violence, do attack various of the employees of your orators and do throw rocks and stones and other missiles at them, and do gather in threatening numbers, and with threats of violence and of injury to the persons of said employees and their families, about the dwellings and residences of said employees, and do threaten violence and injury to said employees and their families and destruction of their homes, unless they, the said employees, refrain and desist from working for your orators. And they, the said defendants, members of said federation, with their wives and others conspiring with them, do gather in numbers on and along the highways and other ways by which said employees pass to and from their work, and do threaten and attempt to intimidate the said employees, and in instances too numerous to mention or specifically set forth, have attacked, assaulted, and beaten the employees of your orators and endeavored from day to day to forcibly and by violence and by threats and intimidations to prevent the employees of your orators from going to their work;" * * * "have in large numbers picketed the localities of the homes and residences of the said employees of your orators, and also the highways and other ways by which they pass to and from their work, and in many instances too numerous to mention, have done this with their wives and other women of their families, and have attacked and assaulted the said employees with brooms dipped in filth of the worst description, and have thrown such filth at the said employees, and thereby, and by other means of violence, have from

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day to day and continuously endeavored forcibly to prevent the said employees from working for your orators; * * * that the said illegal acts and doings of the said defendants still continue from day to day, and that the said defendants threaten and intend to continue the same, whereby your orators aver that they and each of them are from day to day subject to the same and to the great and irreparable damage to their respective properties and business, as well as to the great financial losses resulting therefrom, and that the said defendants are wholly financially irresponsible, and could not in any degree respond to your orators or either or any of them in damages."

In conclusion, an injunction to restrain such alleged unlawful acts is asked for in a proper prayer for relief.

The bill is sworn to by seven officers and employees of complainants who depose and say that they are authorized to sign and verify said bill; that they know the contents thereof, and that the same and the several allegations thereof are true of their own knowledge, "except as to matters therein stated on information and belief, and as to such matters they believe them to be true." In that connection it is to be noted that the charges just quoted from the bill, and others of like import, are stated positively, without qualification, and not upon information and belief.

Defendants, through counsel, entered their appearance in said suit, and were served with a copy of the bill. They filed no answer, but moved the court to dissolve the injunction as improvidently issued because the allegations in complainants' bill are too general in their nature, not properly verified, and not supported by any showing on which a temporary injunction should or could have been granted. No contrary showing was made. The motion was stated to be "based upon the alleged insufficiency of the bill," under which it was urged and argued that the court had no power to grant an injunction. The court

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adopted this view and dissolved the injunction in toto, giving complainants leave to make further application supported by affidavits on not less than 10 days' notice to defendants, saying in his opinion:

"This court will protect the right of every man who wants to work not to be interfered with by violence, intimidation, or threats; * * * this court will stretch out its arms to protect both sides in those rights."

During the hearing of the motion, on September 29, 1913, counsel for complainants, on intimation from the court that the injunction previously granted was "too broad and sweeping," requested the granting of a modified order restraining specified acts of violence and intimidation, certain of which the court stated were "unquestionably not debatable," and "the courts practically unanimous in preventing" them, but, after discussion, this was refused, the court saying:

"I will deny the restraining order and leave you to whatever course you want to take. I am satisfied from Mr. K—'s argument that I have no power to issue it."

After further discussion, being asked to reserve the right to issue a restraining order in case of future developments which might make it seem necessary, the court said:

"Well, I do reserve that right to issue a restraining order, without notice, upon showing made by affidavits, with or without notice."

On October 4, 1913, relators presented to respondent an application for a restraining order, accompanied by many affidavits disclosing that a situation had developed immediately upon the dissolution of the injunction which clearly made it the duty of the court to stretch out its arm and exercise that right.

The affidavits, 84 in number, are freighted with

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narratives of rioting, acts of violence, threats, insults, and intimidation of men, women, and children too numerous to attempt to repeat here, fully substantiating and showing continuation of the unlawful conduct by defendants alleged in complainants' bill. The affiants testify positively from personal experience and observation. The affidavits are not only made by employees of complainants and their families, but by others, officials and private citizens, in many walks of life. They tell of the strikers, members of the defendant federation, and their sympathizers parading with noise and insults and threats, attacking, assaulting, and driving back peaceable workmen going to their employment, of men irregularly grouped together in bands of from ten to a dozen to mobs of six and seven hundred at various times both day and night, with threatening demonstrations and words, of their lying in wait for and attacking employees of complainants as they went to and from their work, assaulting them with clubs and rocks, snatching from them their dinner pails and trampling them upon the streets, applying to them vile and vulgar epithets, threatening violence not only to themselves, but to their families, to kill, to dynamite, and to blow up their houses. They tell of peaceable citizens of long residence in those communities, with their established homes and families there and whose only offense was an attempt to continue work where and as they had been employed for many years, being assaulted on the highways, mobbed, their clothing torn from them, spit upon, coal ashes and slops thrown on them, bottles and rocks hurled at them often inflicting serious injuries, even in sight of their wives watching from their homes, of boarding houses and homes of nonunion men being surrounded and stoned, with taunts and insulting threats, of women and girls struck with missiles and injured on such occasions, of mobbing trains, defying the civil authorities, re-

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sisting and assaulting officers, of resort to firearms in which employees of complainants and others were wounded, and other overt acts of lawlessness, disorder, and violence clearly substantiating the allegations in complainants' bill, and fairly indicating concerted action on the part of defendants to promote the strike by an aggressive policy of force and intimidation. Upon such showing the trial court again refused to grant any relief, and this application for a mandamus followed. Touching the last application respondent in his answer says:

"Respondent is unable to ascertain from a reading of the petition for a mandamus, and the order to show cause thereon, what relation the second application of petitioners for a temporary writ, which second application was accompanied by the affidavits in question, has in the consideration of the questions before respondent on the motion to dissolve."

This application and the showing then made were in connection with the bill of complaint in support of it, and manifestly based on the right retained by the court on dissolving the injunction to later issue a restraining order, with or without notice, upon showing made by affidavits. In view of this and the assertion of the court that he would protect every man who wanted to work, from violence or intimidation, it was proper, and the duty of relators to again apply to that court for relief before appealing elsewhere.

Briefly stated, respondent's answer is that, though disposed to grant a restraining order, he had no power to do so because of the insufficiency of the bill. Upon that proposition the answer states:

"Respondent was disposed at said time to issue some form of restraining order, but that his final determination was that under the bill as filed, respondent had no power or authority to issue such restraining order, and thereupon respondent signed and caused to be filed the order dissolving the writ of injunction issued in said proceedings; * * *" and

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alleges that "after a full and fair consideration of the matter at the time of the hearing on the motion to dissolve, respondent then concluded and now is satisfied, that in the form in which said bill is filed, respondent then had no authority to issue a temporary injunction upon such a showing, and that he is now satisfied that his act in issuing or granting said temporary injunction was improvident and was not justified under the rules and practice obtaining in this State relative to the issuance of temporary restraining orders by chancellors."

The question before us, therefore, is, primarily, one of law. The return shows respondent exercised no discretion as to the injunction, holding, as a matter of law, that he had no power to do so.

The motion to dissolve the injunction being without answer or opposing affidavits, the allegations in the bill are to be taken as true. *Schwarz* v. *Sears*, Har. Ch. (Mich.) 440. The facts stated in the bill, showing conspiracy, illegal acts of violence and intimidation, committed and continuing, are to be treated as confessed and admitted, if properly pleaded.

The bill is certainly not demurrable. It states a case with sufficient averments and general allegations of facts which, if sustained by proof on final hearing, would entitle complainants to the relief asked.

The contention that the bill of complaint is not properly verified is untenable. As before stated, it is sworn to positively by seven affiants of their own knowledge, with the usual reservation found in the form of such jurats, "except as to matters therein stated upon information and belief," and the material allegations in the bill essential to entitle complainants to relief if proven are stated without qualification.

The chief charge of insufficiency against the bill is that its averments are too general, more in the nature of conclusions than distinct statements of facts, and state no specific acts of particular individuals, with time, place, and attending circumstances such as good

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pleading demands. While it is permissible, and sometimes requisite, to set forth the facts and acts relied on fully and with particularity in a bill, as a rule general certainty is sufficient in a pleading in equity. It is not required to relate the details:

"It is not necessary to charge minutely all the circumstances, which may conduce to prove the general charge; for these circumstances are properly matters of evidence, which need not be charged in order to let them in as proofs." Story's Equity Pleadings, section 28.

As a pleading this bill contains a sufficient, though general, statement of the essential ultimate facts involved in the controversy, which, taken as true, confer on the court authority to grant permanent relief by injunction, and if necessity is shown, temporary relief until final hearing. We find here that the court did in the first instance grant this temporary relief by injunction, on September 20th, in apparent exercise of his discretion, and, on September 29th, withdrew such relief by dissolution of the same, because convinced by argument of counsel that he had no discretion in the matter. The effect of this action, under the circumstances disclosed in the record, is a matter of which it is no violence to say there might be some judicial notice and foresight. When the probable results were suggested by counsel, with an application for some kind of restraining order to guard against the same, the court indicated a desire to grant the relief, and apparently only refrained on the ground that he had no power under the bill. When later, on October 4th, further application was made, supported by a large number of affidavits disclosing fully the condition which had developed, as was previously feared, the court again refused for the same reason. We are impelled to hold that the respondent misconstrued the law and his official duty, under the showing made.

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When such an application is made for preliminary protection, the questions to be passed upon and determined from the showing are only the necessary factors in granting or denying a temporary restraining order.

"It is not necessary that the complainant's rights be clearly established, or that the court find complainant is entitled to prevail on the final hearing. It is sufficient if it appears that there is a real and substantial question between the parties, to be investigated in a court of equity, and, in order to prevent irremedial injury to the complainant, before his claims can be investigated, it is necessary to prohibit any change in the conditions and relations of the property and of the parties during the litigation." *Goldfield, etc., Mines Co.* v. *Miners' Union* (C. C.), 159 Fed. 511.

And this is especially true when not only the safety of property but the peace of a community and the choice of action and even the lives of peaceable citizens and their families, when in the pursuit of their lawful avocations, are menaced by disorder, threats, and violence.

The power and duty of courts of equity to restrain, on proper application, conspiring labor organizations and their members, as well as others in the conspiracy, from molesting by violence, threats, and intimidation, or any other unlawful interference with, those engaged in any lawful employment and those employing them, is too well established and too thoroughly reviewed by our own authorities to call for citations from other States or discussion here. *Beck* v. *Protective Union,* 118 Mich. 497 (77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421); *United States Heater Co.* v. *Molders' Union,* 129 Mich. 354 (88 N. W. 889); *Ideal Manfg. Co.* v. *Ludwig,* 149 Mich. 133 (112 N. W. 723, 119 Am. St. Rep. 656); *Id.,* 149 Mich. 699 (113 N. W. 20); *Enterprise Foundry Co.* v. *Iron Molders' Union,* 149 Mich. 31

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(112 N. W. 685, 13 L. R. A. [N. S.] 598); *Escanaba Manfg. Co.* v. *Labor Council,* 160 Mich. 656 (125 N. W. 709); *Baldwin* v. *Liquor Dealers' Ass'n,* 165 Mich. 98 (130 N. W. 214); *Ideal Manfg. Co.* v. *Wayne Circuit Judge,* 139 Mich. 92 (102 N. W. 372).

In the latter case, as in this, the respondent failed to exercise the discretion which the law required of him under the circumstances, and declined to issue an injunction, through an apparent misconception of the law, and this court directed a mandamus requiring him to issue a restraining order.

We are constrained to hold that the writ prayed for must issue herein, directing respondent to vacate his order, setting aside and dissolving the temporary injunction theretofore granted by him and continue the same as indicated in the order to show cause issued by this court, until final hearing of said injunction suit, or until changed conditions shown to the court render the same no longer necessary. On the oral argument of this application learned counsel for the Quincy Mining Company said:

> "The backbone of the strike was about broken when this court modified the former injunction, and the strikers have taken occasion to take a different meaning to it in its present form than, perhaps, the court meant in modifying its terms."

We find difficulty in reconciling this statement with the conditions existing at the time referred to, as represented to us by the verified emergency application and accompanying affidavits presented by relators. At that time there was no injunction in force from any court, and it was represented that the strike had gathered such strength, developed in magnitude, and sprung into such lawless activity that the property of complainants and the lives of their employees were in imminent jeopardy, demanding immediate action, without time for notice, to save them from irreparable injury. We advert to this only because of the

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alleged misunderstanding as to our order and the fact that counsel has filed a brief along those lines. This court, as such, is not concerned with strikes or their continuance, as such. Courts do not grant injunctions to restrain strikes lawfully conducted. They are only concerned with them when lawlessness and acts of violence and intimidation develop from them.

To avoid any misapprehension, let it be understood, and, if necessary, further provided, that parades directed to and loitering at and around the premises of complainants or the homes of their employees, and so timed and conducted as to meet and obstruct such employees going to and from their work during morning and evening changes of shift, and any and all meeting and parading accompanied by acts of violence, threats, insults, or hostile demonstrations towards complainants or their employees either by act or word are in no sense "peaceable meeting and parading," but directly to the contrary, and all such conduct must be regarded as strictly within that provision of the injunction prohibiting defendants "from impeding, obstructing, molesting, or disturbing the employees of the said complainants or any of them by threats, violence, insults, gatherings, parades, or any form of intimidation whatsoever or by any acts of any kind calculated or intended as or for intimidation of the said employees or any of them."

Let a writ of mandamus be issued as above indicated.

STONE and OSTRANDER, JJ., did not sit.

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BUCK *v.* WESTERN CONCRETE BRIDGE CO.

MASTER AND SERVANT—FELLOW-SERVANTS—SCAFFOLDS—DUTY TO SELECT SUITABLE MATERIAL—NEGLIGENCE.

Where defendant's superintendent and manager in charge of bridge construction ordered one of the workmen to change a scaffold that was used in the work by nailing one end of a supporting plank to an old horizontal timber which was defective and insufficient to support the scaffold, as an inspection would have disclosed, and the workman, in performing the work, concluded it would not be secure and so advised the superintendent, who ordered him to proceed, saying that it was safe, the act of the superintendent was that of the employer in negligently selecting unsuitable material, and plaintiff's right to recover was not barred by the fellow-servant rule. OSTRANDER, J., dissenting.

Error to Ingham; Wiest, J. Submitted April 11, 1912. (Docket No. 65.) Decided December 20, 1913.

Case by John Buck against the Western Concrete Bridge Company for personal injuries. Judgment for defendant on a verdict directed by the court. Plaintiff brings error. Reversed.

Frank L. Dodge, for appellant.

Kleinhans & Knappen (Cummins & Nichols, of counsel), for appellee.

MCALVAY, J. Plaintiff brought this suit against defendant, an Illinois corporation, for the purpose of recovering damages for personal injuries received by him, charged to have been caused by the negligence of defendant, in whose employ plaintiff was engaged as a common laborer at the time of his injury. There is very little dispute upon the facts in the case, but,

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as a verdict was directed against plaintiff, we will state as established the case presented by him, which tended to prove the following facts:

Defendant, under contract with the city of Lansing, was at the time of plaintiff's injury engaged in constructing two bridges within said city. In charge of this work, as representing defendant, was G. M. Chandler, manager, who superintended the construction of both bridges. He hired and discharged all of the workmen and was the only representative of defendant continually present during the construction. He opened an account in a local bank in defendant's name, in which he made deposits, and from which he drew moneys to pay all expenses for labor, etc., upon defendant's checks signed by him. Mr. Chandler was authorized by defendant to secure these contracts and was represented by the president of the defendant corporation, who executed the contract for the defendant corporation, as its manager, by signing Mr. Chandler's name, as such manager, upon the blank, required by the city. Mr. Chandler also executed a modification of such contract, signing the name of defendant, by George M. Chandler, manager. His duties, so far as this record shows, were those of superintendence only. He in no instance performed any work with the men. Mr. Chandler testified that he had general charge of the work of construction of these bridges under written orders of the president of the defendant corporation. There were several men employed on these bridges by Mr. Chandler, including Mr. Dora, foreman. He also testified that he was a civil engineer by education and profession, employed by defendant.

The accident to plaintiff occurred during the construction of the bridge over Sycamore river, on Mt. Hope avenue. This bridge was replacing an old wooden bridge which had been partially taken down during this construction, leaving some piles standing,

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with a 12x12 inch timber or bridge cap on top of them which extended out from the bank about 12 feet on the north side of the bridge at the east end. On the day of the injury to plaintiff, excavation had already been made along the bank of this stream to receive the concrete of which the abutments were to be constructed, and the concrete had been filled in at the south end. For the purpose of providing means for getting the concrete from the bank, where it was mixed, and dumping it into the excavation, it was necessary to build from the bank a scaffold upon which it was to be wheeled by the workmen. The scaffold was being erected on the day in question and was completed except the north end. The workman in charge, named Lettimore, discovered that the scaffold at the north end was being built too far away from the bridge to dump the concrete into the trench, and the pieces of timber put up to support the north end of the scaffold were taken down in order to move them nearer the bridge. While this was being done, Mr. Chandler, who was present, standing on this old bridge timber, ordered Lettimore to nail the top crosspiece, which was to support that end of the scaffold planks, to the end of the 12x12 inch bridge cap timber, above described. This workman examined the old timber and told Mr. Chandler that he did not think it safe. Mr. Chandler again ordered him to nail it on there, saying that it was safe. He obeyed Mr. Chandler's instructions, and with the assistance of another workman nailed the end of the plank which was to support the scaffold to the end of the 12x12 inch timber with several 60d. spikes, and then went to the shed for an iron spike 8 or 10 inches long, which he also drove through the plank into the end of this 12x12 inch to make it doubly secure. He says he changed his construction because of Mr. Chandler's orders. The scaffold planks were then put on and plaintiff was ordered to wheel cement onto the scaf-

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fold and dump it into the trench. He started with the first load, which is estimated to have weighed 500 pounds, and wheeled it to the north end, when the scaffold gave way where it was nailed to this old timber and let him down, with his wheelbarrow and load to the ground below, a distance of about 15 feet, causing him severe injuries. Plaintiff was not present and took no part in constructing this scaffold. At the argument exhibits were used consisting of photographs and the piece of 12x12 inch timber which was selected by Mr. Chandler. This appeared to be absolutely unfit for the purpose of supporting a scaffold, as was easily discoverable upon the slightest examination.

Both sides introduced testimony in the case, and at its close defendant moved the court to direct a verdict in its behalf "for the reason that the injury, if any, resulting to the plaintiff was because of the fault or negligence of a fellow-servant." The court accepted this view of the case and granted this motion. The case is before this court on writ of error. The assignments of error involve but one principal question, and that is whether the man Chandler was the vice principal of defendant and acting in that capacity at the time he ordered the scaffold to be nailed to the timber in question. The learned circuit judge held that Chandler was the vice principal of defendant in its employ in and about the construction of these bridges, but that in this matter he was performing a delegable duty, and his negligence in such case was the negligence of a fellow-servant, and therefore plaintiff could not recover.

Under the ruling of the court in deciding the motion for a directed verdict, it will not be necessary to discuss at any length the question as to whether Mr. Chandler was a vice principal. Defendant in the instant case concedes that Mr. Chandler's relations to it and to plaintiff were such that for some purposes

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he might in law be regarded as a vice principal, but that in the performance of the particular act he was acting in the capacity of a fellow-servant. This was the exact contention in the case of *Shumway* v. *Manufacturing Co.*, 98 Mich. 411, 414 (57 N. W. 251, 252). Mr. Justice MONTGOMERY, speaking for the court, said:

"* * * And the contention is that the question of whether the act was that of the master or a fellow-servant depends for its solution rather upon the nature of the act, than upon the general scope or extent of the superior servant's authority. The contention, precisely as made, is undoubtedly supported by eminent authority, but we are constrained to hold that the previous holdings of this Court have not so limited the liability of the master. See *Slater* v. *Chapman*, 67 Mich. 523 [35 N. W. 106, 11 Am. St. Rep. 593]. * * * The decisions of this Court have extended the rule so that it may be said that when the master delegates to a superintendent full power to manage a business, and employ and discharge servants, without interference, such superior servant, in whatever he does in furtherance of the business and operations he has in charge, stands in place of the master, and the negligence of such superior servant is the negligence of the master."

Counsel for defendant contend that the instant case is controlled by the decision of this court in *Schroder* v. *Railroad Co.*, 103 Mich. 213 (61 N. W. 663, 29 L. R. A. 321, 50 Am. St. Rep. 354), and similar cases which followed that decision. In our opinion this case is distinguishable from these cases.

Mr. Chandler, as vice principal, gave this order to change the manner of the construction of the scaffold, and his act in so doing was the act of the defendant corporation. The question to be determined here is not whether this was a delegable duty but whether the order of Mr. Chandler was the act of the defendant. *Shumway* v. *Manufacturing Co.*, *supra*. If it may be

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said that this duty had been delegated, the order of the vice principal revoked such delegation.

It is contended on the part of defendant that no question of proper material not having been furnished is in this case. It is difficult to see how the selection by the vice principal of the bridge cap timber was not a selection and furnishing of material for use in the construction of this scaffold. It was used for the exact purpose for which a workman had a piece of timber at hand ready to use, and by this order that piece was discarded and this timber selected, and, as far as the facts show, it was clearly not fit for the use for which it was intended.

In another respect this case also differs from the cases relied upon by defendant, and that is that Mr. Chandler at no time assisted in the work of construction on these bridges. He was a superintendent and performed only duties belonging to such position. He was more than that; he was held out by the defendant company as it manager.

Other matters discussed do not require determination. The facts presented by plaintiff entitled him to have his case passed upon by a jury. The trial court was in error in directing a verdict for defendant. The judgment of the circuit court is reversed, and a new trial ordered.

STEERE, C. J., and MOORE, BROOKE, KUHN, and STONE, JJ., concurred with MCALVAY, J.

BIRD, J. *(concurring)*. I agree with Mr. Justice MCALVAY that the case should be reversed, but I think the reversal should be placed upon the ground that Superintendent Chandler furnished or used defective and unsuitable material in the erection of the scaffold. As to this act, to wit, of furnishing materials to make a reasonably safe place for plaintiff, he was acting for the master with respect to a nondelegable duty. *Van*

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Dusen v. *Letellier*, 78 Mich. 492 (44 N. W. 572). In the work of constructing the scaffold, had proper and suitable materials been furnished, his act was that of a fellow-servant. *Beesley* v. *F. W. Wheeler & Co.*, 103 Mich. 196 (61 N. W. 658, 27 L. R. A. 266). The defendant made no showing that other and more suitable materials were furnished which might have been used for the support of the stringer in place of the decayed 12x12. In the absence of such showing on the part of the defendant, the presumption is that the materials used were the materials furnished, and the failure in this regard was the failure of the master.

OSTRANDER, J. *(dissenting)*. In my opinion the testimony does not show that defendant had delegated to Mr. Chandler full power to manage its business, even in the particular locality, and therefore the case does not fall within the rule of *Shumway* v. *Manufacturing Co.*, 98 Mich. 411 (57 N. W. 251). I cannot distinguish this case and *Corey* v. *Iron Co.*, 151 Mich. 558 (115 N. W. 737). Justices HOOKER and MONTGOMERY, who took part in the earlier decision, also approved the later one; Justice HOOKER writing the opinion. See, also, *Peters* v. *Railroad Co.*, 165 Mich. 217 (130 N. W. 602).

The judgment should be affirmed.

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CLARK v. GOLDIE.

1. EVIDENCE—MASTER AND SERVANT—NEGLIGENCE—ADMISSIONS.
Evidence that defendant's superintendent stated before the coroner's jury at an inquest that defendant had intended to replace the pulley which burst and killed plaintiff's intestate, but thought they would let it run awhile, was not admissible as substantive proof of his knowledge that the machinery was defective.

2. MASTER AND SERVANT — NEGLIGENCE — FELLOW-SERVANTS — DEFECTIVE MACHINERY—DEATH.
In an action for the wrongful death of defendant's servant, testimony that a fellow-servant pried on and strained a pulley, weakening it, was not a proper basis of liability, since it was the act of a fellow-servant not shown to have been brought to defendant's notice.

3. SAME—INCOMPETENCY OF EMPLOYEE—FELLOW-SERVANTS.
And it was not evidence of the incompetency of defendant's foreman that he had never observed the peculiar sound emitted by a cracked iron pulley, which certain witnesses testified was always recognizable when a defective pulley was running.[1]

Error to Bay; Collins, J. Submitted June 11, 1912. (Docket No. 30.) Decided December 20, 1913.

Case by Charles Clark, administrator of the estate of William F. Clark, deceased, against William Goldie and William Goldie, Jr., copartners, for the unlawful killing of deceased. Judgment for plaintiff, and defendants bring error. Reversed; new trial denied.

Cooley & Hewitt, for appellants.

Hall, De Foe & Henry, for appellee.

[1] On the question of the master's constructive knowledge as to capacity of servants as element of liability to injured servant, see note in 41 L. R. A. 46, 53.

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MCALVAY, J. This case is before this court for the review of a judgment obtained by plaintiff against defendants upon the second trial had after its reversal in this court. The case is reported in 146 Mich., at page 303 (109 N. W. 1044). That opinion, to which reference is had, contains a full statement of the facts in the case, which need not be repeated. The case was reversed because the evidence, in the opinion of the court, was not sufficient to show that defendants had knowledge of a defective condition of the pulley and insufficient to show that they were negligent in failing to inspect the pulley in question more frequently than the record shows. Appellants contend that the present record presents no other or different case than that examined and passed upon when the case was first before this court. The record of the testimony upon the former trial was contained in about 100 pages. In the present record there are over 300 pages. The nature of the case presented when first before this court was of a character which required an analysis of all the evidence and the determination whether it was sufficient to show liability on the part of defendants, and in discussing and analyzing such evidence it clearly appears from the opinion wherein the court considered that no liability on account of negligence on the part of defendants had been shown. It is evident from the record now presented to the court that such critical consideration of the evidence in the case then made has since that time been given first consideration by plaintiff. This is frankly acknowledged in his present brief, which states, "The present record meets and overcomes each point and suggestion of the opinion." And following such statement says that in this record will be found the following evidence:

"(1) That defendants, or their conceded *alter ego*, Kennedy, the superintendent, prior to the bursting of

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the pulley, had notice and knowledge that it was defective and should not have been used.

"(2) That the pulley was on the shaft at the time Drake examined it the morning following the accident when he saw the sledge marks on the hub, and had not been removed as inferred by the court in the opinion.

"(3) That the pulley as employed was not only exposed to great strain, but was frequently subjected to undue risk of cracking and checking, both in its rim and spokes, by the practice of employees placing one end of a plank 12 feet long, 6 inches wide, and 1¼ inches thick under the surface of the rim of the pulley and by means of a fulcrum beneath the plank exerting a force equivalent to three tons upon the pulley to force it up so that it could be made to carry and maintain the under part of the belt in line with the lower of the two corner pulleys around which it passed.

"(4) That inspection of such pulleys is had not alone for the purpose of keeping them in good working order, but as well to keep and maintain them in a condition reasonably fit and safe for use.

"(5) That the pulley was not an idle one placed underneath the belt merely to keep it from sagging and to idle it along, but in fact was a work pulley, exposed to great strain, and in consequence of the manner in which it was forced and maintained in place and the office which it filled, one that called for oversight and inspection, not merely to keep it in good working order but to determine whether the strain of such exposure and manner of use weakened it and rendered it unfit to perform its office.

"The foregoing cover all subjects contained in the former opinion, and they will each be considered in the order most conformable to the brief of defendants."

Appellants in presenting their contentions discuss first the proposition that the present record does not disclose evidence of defendants' negligence, and urge that under the undisputed testimony—

"The pulley in question was suitable for the work required and was sound when placed in the sash

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frame by Drake before the mill commenced operation January 28, 1903, and was in like condition two or three weeks later when placed upon the smaller shaft; the iron boxes or bearings at each end of which being bolted to stationary upright posts. It was thoroughly examined and tested on each occasion."

They also contend that the record shows it was examined by Mr. Drake not long before the accident.

The first claim on the part of plaintiff wherein this record differs from the former is that defendants, or their superintendent, Kennedy, had notice and knowledge prior to the accident that the pulley was defective and not fit for use. The testimony upon which this claim is founded was allowed over the objection of defendants, first, upon cross-examination of Mr. Kennedy relative to a statement made by him after the accident at the time of the coroner's inquest in presence of some of the jury, which statement he positively denied, and, later, the admission, over like objection, of the testimony of Mr. Morrow, one of the jury, as to what was said by Mr. Kennedy.

The objections of defendants' counsel to receiving this testimony covered the grounds both as to the question of collateral impeachment and that it could not be used as affirmative proof of his knowledge or the knowledge of defendants. There is a dispute between counsel as to the ground upon which this testimony was received and what position counsel and court on the trial and counsel upon hearing in this court have taken in regard to its use. Counsel for plaintiff contend that it was only received as impeaching testimony. Counsel for defendants urge that both on the trial and in this court it was and is used as affirmative proof of the fact. This was the only testimony admitted in the case which indicates, or from which it is claimed, Superintendent Kennedy had any knowledge before the accident that this pulley was defective. The contention of defendants' counsel upon

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this proposition is entirely supported by the record and plaintiff's brief. In the brief, in plaintiff's amended statement of facts, appears the following:

"On the present trial there was evidence that the superintendent, one Kennedy, had notice or knowledge of the defective condition prior to the injury."

Later in the brief, in the argument supporting plaintiff's contention, appears the following:

"(5) There was evidence that Superintendent Kennedy had notice and knowledge prior to the accident that the pulley was not a suitable one for use."

The trial court in his charge to the jury said:

"* * * And if you find that defendants were negligent in that regard and did in fact employ a pulley which was so defective, and they, or their superintendent, Mr. Kennedy, knew of such defect, or it had been continued such a length of time before said injuries that in the ordinary oversight and supervision of the mill they should have discovered it. * * *"

And again later in the charge, as follows:

"The defendants are charged with all knowledge that their superintendent, Kennedy, intrusted with the duty of oversight and supervision had, if any, of the condition of the pulley which exploded, prior to the time thereof."

This charge was given after the following request to charge had been presented on behalf of defendants and denied:

"I charge you that the testimony of witness Morrow regarding certain statements made by Mr. Kennedy, subsequent to the accident, concerning Mr. Kennedy's knowledge of the prior condition of the pulley, are struck from the record, and you are not to consider said statements in reaching your verdict."

Errors are assigned on the part of defendants upon the admission of the testimony of the statements of

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Mr. Kennedy after the accident, and upon the portions of the charge quoted.

The weight of the authorities is against the proposition that testimony of the character of that we are discussing can be received as substantive evidence. This is admitted by counsel for plaintiff in their brief, where it is also contended, notwithstanding the evidence of the record to the contrary, as already pointed out from the brief and the charge of the court, that this testimony was offered and received for the sole purpose of impeachment. As already stated, it was received by the court and allowed to be considered by the jury as substantive evidence of the knowledge of Superintendent Kennedy. In a case cited by plaintiff, this court, where the question was considered at length, in stating that such testimony is allowable, "being in the nature of collateral impeachment," said:

"It could not be used for any other purpose, and was no evidence of the negligence of the defendant." *Lepard* v. *Railroad Co.*, 166 Mich. 373, at page 382 (130 N. W. 668, 40 L. R. A. 1105).

The court erred in allowing this testimony to be considered by the jury as substantive evidence of the knowledge of Kennedy.

The next contention of plaintiff is that the hub of the pulley was on the shaft at the time witness Drake examined it when he saw the hammer marks on it. In the former record, witness Drake, the millwright who installed the machinery in this mill, including this pulley, testified that after the accident he went to examine it to ascertain why it flew to pieces; that it had been taken off from the shaft upon which it was when he installed it; and that there were fresh hammer marks on the hub. The court inferred from his testimony that the hub was not on the shaft when he examined it. As a witness in the present record,

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he states that his impression is that the hub was on the shaft. This record shows that after Drake left defendants' employment, some time in January, 1903, this pulley and shaft was taken out of the movable sash or frame in which he installed it. The pulley was then taken off from the old shaft and put on to another shaft somewhat smaller, upon which it was babbited fast and then was hung between two solid posts at the proper height with five-inch boxes at each end of the shaft countersunk into the posts, where it remained until March 6th following, the date of the accident. The only evidence as to the removal of this pulley from the old shaft is given by one of the men who assisted, who testified that it came off easily without hammering. The evidence is clear that it went onto the new shaft readily, because it was smaller, and there is no evidence in the case tending to show that before the accident there were any hammer marks upon this hub. Therefore it follows that, as far as the hammer marks are concerned, the present record shows affirmatively that none were upon the hub before the accident.

Defendants upon this question requested the court to charge as follows:

"There is no competent testimony in this case which tends to prove that the so-called sledge or hammer marks on the hub of the pulley were made before the accident, and I charge you not to consider such marks as a cause of the bursting of the pulley."

The court was in error in refusing to give this request.

The plaintiff further contends that the present record differs from the former in showing that the pulley was exposed to great strain and subjected to undue risk of cracking by the employees putting under its rim a heavy 12-foot plank and by means of a fulcrum under the lower end putting a strain of three tons under it to force it up to carry the belt and main-

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tain the under part of it in line with the lower one of the corner pulleys around which it passed; that this was not an idler pulley; but that it was a tightener. The record is undisputed that this pulley was installed but for one purpose, and that was to keep the belt which ran over it upon a line with the lower corner pulley. It was formerly set in a frame which would work up and down. Later, it was changed and put upon a rigid shaft set in countersunk boxes on upright posts, where it continued until the accident. A witness testified on the last trial that on several occasions, the last time the night before the accident, he, with two other employees, strained this pulley up higher with the heavy plank under its rim.

It is apparent to one at all acquainted with mills and machinery of this character, and from the evidence as to how this pulley and its shaft were affixed to the posts at the time of the accident, that this witness was testifying to a physical impossibility. However, taking this testimony as true, whatever was done was the act of a fellow-servant in no way brought to the knowledge of the defendants and for whose negligence they would not be liable. It was one of the risks assumed by the plaintiff's decedent.

This pulley was called by some of the witnesses a "tightener." It carried the belt for the purpose of keeping it running on the corner pulley. This belt simply ran over the pulley in question, and whatever strain there was upon it came from this belt. It was a rubber belt which drove two saws, and which on account of stretching was occasionally cut and laced to take out the slack. The record does not show that this pulley was carrying what is known as a "load." There is a great deal of testimony introduced in the case which is claimed on the part of plaintiff to bear upon the question of the strain upon this pulley which, when carefully considered, refers to the load upon the drive pulley which operated the saws and the

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kind and weight of belts best adapted for such purposes, tending to show that a belt similar in width to the one in question (the thickness and character of which was not identified) would slip in attempting to do such work; in other words, that this belt was overtaxed.

The negligence charged in the declaration is that defendants negligently used and operated a cracked and defective pulley without due and proper inspection by competent and skilled employees to see that it was reasonably safe and proper for use for the purpose for which it was designed, and there is no allegation of negligence that the accident was caused by an overtaxed belt. The evidence relative to overtaxing this belt tends to show that the heavier it was loaded the more slack it would give, and consequently less pressure upon the pulley in question.

It is urged that this record shows that the foreman in the shop was incompetent for the reason that he had never observed the peculiar noise given out by a cracked iron pulley, which several witnesses testified was always recognizable when such a defective pulley was running. This man had never heard such a noise, which seems to be the foundation of the argument upon which his incompetency is claimed. All of the witnesses on both sides, including the foreman, who testified upon this subject and who were employed in this mill at the time and before the accident, say that they never heard it give forth the sound which comes from a defective and cracked pulley, even up to the time of the accident, and all of them, except the foreman, say that that is one of the best methods of detecting such defects in a pulley, all of which tends to show that defendants had no notice of the defective condition of this pulley, if such existed, before its collapse, and does not tend to show the incompetency of the foreman, but by a fair inference

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that he had never been employed in a mill where cracked pulleys were operated.

Careful examination has been given to this entire record, particularly wherein it is claimed to differ from the former one, and while it is three times as bulky as when the case was formerly considered, we do not find in it more frequent inspections are customarily made by ordinarily prudent employers and we agree with the appellants that, upon the questions which are determinative of the case, this record presents no other or different case for consideration than when formerly considered, except as herein otherwise expressed upon the admission of evidence and the charge of the court. The former decision is therefore followed. *Hall* v. *Murdock*, 119 Mich. 389 (78 N. W. 329).

The judgment of the circuit court is reversed, and in view of the fact that there have already been three trials, and there is no probability that any other or different case can be presented, we are constrained to hold that no new trial will be granted.

STEERE, C. J., and MOORE, BROOKE, STONE, OSTRANDER and BIRD, JJ., concurred.

B. MARX & SON *v.* KING.

1. CONTRACTS—EVIDENCE—SALES.
   Evidence, in an action for the purchase price of goods, considered and *held*, to present a question for the jury whether plaintiffs ratified the contract for discounts made by their agent and salesman as claimed by defendant.
2. TRIAL—OPENING STATEMENT—CONDUCT OF COUNSEL.
   That the attorney for defendant referred in his opening

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statement to incompetent evidence was not ground for reversal where the court excluded certain claims made by counsel and cautioned the jury to disregard anything that the evidence to be received did not sustain.

3. SAME—EVIDENCE—CROSS-EXAMINATION.

Although affirmative proof of dealings of similar character to those in dispute was inadmissible under a previous ruling of this court in the cause, defendant was not precluded from questioning one of the plaintiffs, on cross-examination, concerning the discounts that he allowed other purchasers.

4. SAME—CONSPIRACY—GOOD FAITH—CROSS-EXAMINATION.

And upon his cross-examination, the court properly allowed an inquiry whether the plaintiffs had ever called upon the surety company, which indemnified them against loss through wrongful acts of their servants who were claimed to have conspired together to allow unauthorized discounts, to reimburse them for the losses by such claimed fraud; the inquiry had a bearing upon plaintiffs' good faith.

5. SAME—WITNESSES.

Nor was it error to permit defendant's counsel to interrogate the witness with reference to their insolvency and good faith in transferring their assets to a corporation bearing the name of the insolvent partnership.

6. SAME—ARGUMENT—APPEAL AND ERROR.

Comments made by defendant's attorney which the court held to be improper and duly corrected, were not ground for reversal: and as to matters not brought to the attention of the trial judge by request for a ruling, they are not subject to review on error.

Error to Washtenaw; Kinne, J. Submitted October 9, 1912. (Docket No. 13.) Decided December 20, 1913.

Assumpsit by Jacob L. Marx and Eugene H. Kopple, copartners, as B. Marx & Son, against Johanna King, executrix of the estate of Joseph King, deceased, for goods sold to decedent. Judgment for defendant. Plaintiffs bring error. Affirmed.

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Bernard B. Selling, for appellant.

John P. Kirk (M. J. Cavanaugh, of counsel), for appellee.

BIRD, J. This is a controversy between plaintiffs, who were wholesalers of leather good and furnishings in the city of Detroit, and one of their customers who carried on business in Ypsilanti. They dealt with each other for several years without serious disagreement, until the present controversy arose over the allowance of certain discounts which defendant King claimed he was entitled to under an agreement with their agent Berger, and which was subsequently ratified by Mr. Marx, one of the plaintiffs. In July, 1906, the defendant expanded his business by jobbing some goods in connection with his retail business. This change increased the size of his orders, and in consequence thereof he demanded a larger discount from Berger, the agent who sold him the goods. It is claimed Berger conceded the discounts. The invoices, however, did not show them as agreed upon, and defendant, by one of his clerks, called plaintiff Marx on the phone and made the inquiry why the discounts did not show upon the invoices. Marx replied that King and Berger had an understanding and directed him to settle with Berger, and it would be all right. Plaintiff Marx denies this conversation, and denies that Berger had authority to allow the discounts claimed, and denies that he ever ratified any arrangement made with Berger for discounts. If defendant was right in his contention, he is entitled to the verdict which was rendered. On the other hand, if the plaintiff Marx's version of the matter is true, that he never authorized the discounts and never ratified any agreements of Berger allowing them, the plaintiffs are entitled to recover a considerably larger sum. This question was the "storm center" around which gathered most of the testimony in the case. On

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a former trial, a jury found with the defendant. For errors in the admission of testimony the judgment was reversed by this court. 162 Mich. 258 (127 N. W. 341). The case has been retried with a like result, and plaintiffs again complain of errors in the trial court.

1. Plaintiffs made a motion for a new trial, alleging, among other things, that the verdict was against the weight of the evidence. This motion was denied, and the denial of it is made the basis for an assignment of error. In the former opinion of this court, the same question was raised, and the testimony was held to present a question for the jury. It is pointed out, however, by counsel, that the plaintiffs' case was very much strengthened on the second trial by additional testimony, and this testimony is referred to in detail. The most that can be said for the additional testimony is that it lent credence to plaintiffs' contention that Marx had no such conversation over the phone as claimed by defendant, and at the same time made defendant's claim less tenable. But we are of the opinion that the additions to the testimony did not so change the situation as to remove the question from the domain of fact. It was still a question for the jury, as there was conflicting testimony which, if believed, would justify the verdict. It follows from this conclusion that the court was not in error in refusing to direct a verdict for the plaintiffs, as requested.

2. Complaint is made that, in opening defendant's case to the jury, his counsel transgressed the holding of this court in its former opinion. On the first trial, in an attempt to establish authority of the agent Berger to allow the discounts claimed by defendant, proof of similar dealings with other customers was offered and received in evidence. This court held the admission of such evidence reversible error for the reason that the dealings with other customers were unknown to defendant at the time of his dealings with

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plaintiffs. Defendant's counsel, in his opening statement, made reference to some of this testimony, which was evidently inadmissible under the ruling of the court. The trial court excluded many of the statements made and cautioned the jury as follows:

"I am not disposed to abridge the opening of counsel. I only say to the jury now that the object of an opening is to advise you of the general nature of the case, and when you come to determine your verdict you will be controlled by the evidence, which may not bear out the statements of counsel; if it does not, it will be your duty to disregard the opening of counsel as far as it fails to be supported by the evidence."

We are of the opinion that this instruction to the jury neutralized any prejudicial effect the improper statements may have had on plaintiffs' case. In determining these matters we cannot assume that a jury of average intelligence accepted the improper statements of counsel rather than the positive instructions of the court.

3. Several objections are made to the cross-examination of plaintiff Marx. He was interrogated as to his allowing discounts to other creditors similar to those claimed by defendant. It is urged that this line of interrogation was within the prohibited ruling of this court. We think not. The ruling of this court was directed to the affirmative proof of such dealings by third parties. It does not follow from this ruling that defendant would be precluded from questioning the plaintiff himself about such dealings, as it might have an important bearing upon his credibility.

3*a*. Upon cross-examination the witness Marx was also directed by the court to make answer to an inquiry as to whether he had ever called upon the surety company to make good the money his firm had lost through the peculations of Berger and French. The testimony showed that the firm had lost a considerable amount of money as the result of a conspiracy

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between the bookkeeper, French, and the traveling man, Berger, and that French was a bonded employee. The declaration in the case charged the defendant, King, with being in a conspiracy with French and Berger to defraud the plaintiffs by the allowance of unauthorized discounts. In view of the charge of conspiracy, the inquiry was a proper one. In answer to the inquiry, the witness admitted that no demand had been made on the surety company. This developed a situation which, unless fairly explained, would have a material bearing upon the good faith and credibility of the plaintiff in making the charge of conspiracy in this suit.

3*b*. It appeared that since the first trial the copartnership of Marx & Son had been declared a bankrupt, and a composition had been made with their creditors, and that the assets of the firm had been transferred to a corporation bearing the same name. It further appeared that the same parties were in control of the corporation and that the corporation was the real plaintiff in the case. The witness Marx was cross-examined as to these matters, and his good faith questioned over counsel's objection. It was clearly within the discretion of the trial court to allow the witness to be interrogated in relation to these matters, as they bore more or less upon his credibility.

4. Error is assigned on the improper argument of counsel to the jury. Upon the cross-examination of plaintiff Marx, his attention was directed to a paper for the purpose of refreshing his recollection. It failed of its purpose and was not offered in evidence. Upon the argument, defendant's counsel began to comment on the fact that Marx did not recollect a certain fact after having his recollection refreshed by the paper. Objection was made to this line of argument, and the trial judge promptly stated that comment ought not to be made concerning a paper that was not offered in evidence. Following this ruling,

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defendant's counsel endeavored to show the court that it was a proper argument; but the court again announced that it was improper argument and ordered counsel to pass it. We see nothing in the incident which should have seriously affected plaintiff's case. Whatever harm may have resulted from the improper argument was cured by the ruling of the court.

4*a*. Further exception is taken to the argument of Mr. Cavanaugh, in commenting upon the veracity of the witness Nebel. An exception was taken to the argument, but no ruling appears to have been requested of or made by the trial court. Under the rule, this assignment is not in a position to be reviewed. *Crane* v. *Ross*, 168 Mich. 623 (135 N. W. 83).

Many exceptions are taken to the charge of the court. The charge of the court on the second trial was substantially the same as on the first trial, save the modifications made necessary by the holding of this court. We have examined the charge in connection with the assignments and find no reversible error in it.

The judgment of the trial court is affirmed.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and OSTRANDER, JJ., concurred.

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PANELA *v.* CASTILE MINING CO.

1. APPEAL AND ERROR—DIRECTED VERDICT—EVIDENCE.
   In passing on the correctness of the trial court's action in directing a verdict for defendant, the evidence presented by plaintiff must be considered in the light most favorable to him.

2. MASTER AND SERVANT—MINES AND MINING—DEFECTIVE SIGNALING APPARATUS—NEGLIGENCE.
   Testimony tending to show that the electric signaling apparatus and bell used in connection with the hoist in defendant's mine were defective and the bell gave unreliable or uncertain signals, that, when plaintiff's fellow-servant attempted to signal the operator to draw the miners up out of danger of a blast that they had lighted, the bell did not register the signal which should have been transmitted, and that no one but the hoisting engineer who knew nothing about such apparatus inspected it, and then only when something went wrong, that the miner who gave the signal attempted to give the correct one, but the bell did not sound the proper number of strokes, presented a question of fact relative to the defective condition of the apparatus.

3. SAME—EVIDENCE.
   Held, also, that there was evidence tending to prove that defendant was negligent in failing to maintain its hoisting apparatus in suitable condition to perform the service of removing employees promptly from the vicinity of an explosion or blast.

4. SAME.
   And *held*, that plaintiff's evidence tended to establish his claim that defendant had failed to warn plaintiff of latent danger arising from dynamite which had been left near the place of work by another crew.

Error to Gogebic; Cooper, J. Submitted January 23, 1913. (Docket No. 63.) Decided December 20, 1913.

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Case by Jacob Panela against the Castile Mining Company for personal injuries. Judgment for defendant on a directed verdict. Plaintiff brings error. Reversed.

O'Brien & Le Gendre and *George O. Driscoll,* for appellant.

Belmont Waples and *William F. Shea,* for appellee.

MCALVAY, J. Plaintiff brought suit for damages for personal injuries received while he was employed by defendant company as a miner in the Eureka mine, operated by it. The result of the trial was a verdict instructed by the court at the close of plaintiff's case in favor of the defendant, upon which a judgment was entered. Plaintiff seeks a reversal of this judgment upon the ground that the trial court was in error in directing a verdict against him.

The case has already been before this court, brought here by defendant to review an order overruling a demurrer to the first count of plaintiff's declaration, when this court affirmed the judgment sustaining the declaration. *Panela* v. *Mining Co.,* 165 Mich. 329 (130 N. W. 686). An examination of the opinion of the court rendered at that time will be helpful in the consideration of the instant case.

The facts in the case cannot be stated briefly in order to give the information necessary to its proper consideration, and for that reason the statement of facts presented by the appellant is adopted. This statement is accepted by the appellee for the most part as correct. Reference will be made to its objections later in this opinion.

"Statement of Facts.

"On and before September 17, 1909, defendant was operating the Eureka mine, working the seventh and other levels, and extending No. 3 shaft, which was a steeply inclined 3-compartment shaft, 12x9 feet in

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size, over 1,200 feet deep, and braced with metal sets to a point about 5 feet below the twelfth level and 14 feet above the bottom. There were 12 levels, about 100 feet apart, numbered 1 to 12 from surface downward. The twelfth level was about 10 feet high and 20 feet long. In the west compartment of the shaft, between surface and the seventh level, was a skipway upon which was operated a skip by means of an engine, drum, and cable, in response to signals transmitted by a separate signaling apparatus from that hereinafter mentioned.

"Three crews of miners, each consisting of 5 men and a foreman, and who worked 8-hour shifts, commencing at 7 a. m., 3 p. m., and 11 p. m. each day, were engaged in extending the shaft under a contract with defendant by which they were paid $25 per foot for sinking, and were required to use dynamite, and defendant was to furnish the necessary tools and materials to do the work and convey the miners to and from the bottom of the shaft, and provide them with signaling apparatus, to give signals to be hoisted by the hoisting apparatus. These men relied upon defendant to promptly and safely hoist them by means of the truck and bucket hereinafter mentioned when they signaled from below to move the truck and bucket, especially when explosions were about to take place, and expected that the signaling apparatus would be in such shape that the signal would be promptly and properly transmitted by it, and the hoisting apparatus would be in such shape that it could be promptly operated. They had no voice in the selection of a foreman or the fixing of his wages, and, when one of them quit or was discharged, defendant hired another without consulting the miners. Defendant figured out what each man had coming and paid him at its office.

"The outgoing and incoming crews generally met at the seventh level. The twelfth level was an unsafe place to stay while blasting was going on. None of the members of the several crews would know what had been done in the bottom of the shaft by any other crew unless specially warned by some one else of it. Dynamite might be scattered around there, owing to missed holes or its being left there by other crews, and, in either case, would be dangerous to everybody

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in the shaft and easily concealed by the dirt so as to be difficult to discover. Those who load and fire the blasts can tell, by varying the lengths of the fuses and counting the holes that are loaded and lighted and that go off, whether or not there are any missed holes, and, if so, how many, or at least can tell if less go off than are loaded and lighted. The men went to the seventh level when a blast was set off to count the shots as they went off. The foreman was supposed to keep track of the shots and tell the foreman of the next shift if there were any missed holes. The dirt would be pressed and tamped into the holes, and the holes concealed by the workmen. The workmen were not supposed to be always on the lookout for missed holes. Sometimes there would be none for a couple of weeks or longer, and again they would occur once a week. If a workman is notified that there is one, he is on the lookout for it and can better protect himself from any powder which may be scattered around the shaft. Any missed holes or holes which blasted without breaking were reloaded and blasted. The miners expected defendant to keep track of the powder and missed holes that were left in there by the different shifts and to warn the members of each crew of any left in there by any crew other than their own, and, by doing this, the danger to the miners would be reduced. It was necessary for their safety and protection that they should be so warned. The duty of so warning them was imposed by defendant on the foreman of each crew. It was customary to so give such warning where there were several crews working at the same place. The foreman got more pay than the others. He and the captain planned the work, and he looked after everything, gave orders how to do the work, and, if anything was needed, got it for the men.

"In the middle compartment of the shaft was a track, upon which was operated a truck (6 feet long, with a frame and pulley) and the bucket (2½ feet in diameter and height), by means of a puffer engine, drum, and cable. The puffer and drum were in the same building in which the skip engine was; there being only a partition between the two engines. This building was 115 feet from the shaft house. The cable ran from the drum to a sheave in the frame of the truck and to the bail of the bucket. A pole placed

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across the shaft at the last set prevented the truck from going farther down than that. By this arrangement, the bucket was kept upright, and, when the truck stopped, the bucket would continue to the bottom and then, when it would rise, the bail would catch onto the truck and both would go up together.

"There was a ladderway in the shaft above the top of the twelfth level, but below the seventh level it was in a poor, broken condition, especially near the bottom. A person who climbed through the shaft would have to climb part of the way on the sets, and that was dangerous. There was but one way provided for men to get into and out of the bottom of the shaft, and that was by means of the truck and bucket. The only ladder down there was a poor, short one, which only reached to where the truck stopped.

"The signaling apparatus used in connection with the truck and bucket consisted of an electric bell having an 8-inch gong, which was worked with a magnet, was operated by dry cell batteries, and was attached to the wall of the engine house near the puffer, where there was considerable vibration. Two separately insulated wires ran from it down through the shaft and were attached to the shaft down to a point about 40 feet from the bottom. They were loose from there down. About 3 inches of the insulation was removed from the bottom end of each of the wires. The bell was supposed to ring in the engine house each time the two bare ends of the wires were touched or rubbed together; a long bell was given by holding them together. At blasting times the wires were rolled and carried up the shaft 30 or 40 feet and signals were given from there, and the wires left there to prevent their injury by the blasts. The miners had no opportunity to see the apparatus in the engine house.

"The dirt was loosened in the shaft by drilling holes 7 or 8 feet deep and 2¾ inches in diameter, with air drills, loading them with dynamite, and blasting them by means of caps and fuse. The dirt was hoisted to the seventh level. Each crew worked in sets of two. One set worked in the middle and one in each end of the shaft. Each set was supposed to attend to their own sections and pay no attention to the sec-

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tions of the others. Defendant kept its dynamite, fuse, and caps on the surface. A missed hole is where there has been dynamite loaded in the hole which did not explode. An exploder is a stick of dynamite with fuse and cap attached to it. The fuses were cut about 12 feet long and would burn about one foot a minute. Fuses do not readily take fire, and for that reason the ends are split to expose the train of powder inside. If fire was set to the side of the fuse, it would take about one minute for the fire to reach the train of powder, if the fuse was wet, and about half a minute if it was dry.

"The customary way of doing the work of blasting there was to first clean out the hole, then put the exploder in the bottom, then take other sticks of dynamite, slit the wrappers so they will spread out when tamped, place them on top of the exploder, and tamp them down. The holes are filled with dynamite to about 1½ feet from the top and then fine dirt or rock is put on top of that. A missed hole is loaded in the same way, but the dynamite sometimes comes 6 inches or closer to the top of the hole. After the dirt or rock is put on, none of the powder is exposed. Dynamite can catch fire from the spitting (sparks) of the fuse. It burns slowly, not much faster than fuse. The exploders were prepared on surface and brought down in a box, with the dynamite, in the bucket. After the holes were about ready to load, two men went to surface and got the explosives. After getting them, the two men would go down the shaft and one of them would get off at the seventh level to turn off the air and the other would go down to the last set and then roll or carry the wires up about 40 feet in the shaft and stay there. The bucket would go down to the bottom and the men there would get the dynamite and exploders, load the holes, split the fuses, and get ready to blast, and then two of the men would go up on the truck or the short ladder and pull the ladder up and put it on the sets. The six men would then be thus stationed: One at the seventh level; two in the bottom of the shaft; one 40 feet above the bottom; and two on the truck. The bucket would be in the middle of the bottom of the shaft. Santi and Latvala usually lighted the fuses on plaintiff's shift. When they were ready to light them the fire signals would be given.

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They were: Three bells to hoist the bucket seven or eight feet, one bell to stop, two to lower it again, one to stop it at the bottom, and then one long bell to indicate that they were about to blast. After the fuses were lighted, a seven-bell signal bell was given to indicate that the miners wished to be hoisted to the seventh level. These signals were given by the man stationed 40 feet from the bottom, who could catch the truck as it ascended and go up with the rest. It took seven or eight seconds to give the seven-bell signal, two or three seconds to light the fuses, and about four or five minutes for the bucket to go from the bottom to the seventh level. The miners were usually at the seventh level about four or five minutes before the first blast. The bucket was usually started when the last of the seven bells was given. Because the signaling apparatus could not be relied on, Benny, the engineer, was instructed by defendant to hoist on any signal after the long bell, but the miners knew nothing about that. The fuses were lighted by each man taking in each hand about half the fuses he was to light and holding them over the flame of a candle.

"Holm was the foreman, and plaintiff, Maki, Rusciolelli, Santi, and Latvala were the miners, in plaintiff's crew. Plaintiff had limited experience in mining but had been working in this shaft about a year. September 17, 1909, this crew went to work at their usual time, 7 o'clock a. m., and met the outgoing crew at the seventh level. There were five missed holes left in the shaft by some preceding shift. It appears that the outgoing crew knew that, and so informed plaintiff's foreman. When plaintiff's crew got to the bottom they found a quantity of dirt which had been loosened by one of, but not removed by, the other shifts. It took plaintiff's crew about an hour to remove this dirt. Plaintiff and Latvala worked in the west end, Santi and Rusciolelli in the east end, and Holm and Maki in the middle of the shaft. No new holes were drilled that morning. Plaintiff and Latvala found five holes in the west end, not missed holes, but holes which had been blasted before; Santi and Rusciolelli found only three missed holes; but they also found some other holes (Rusciolelli could not say how many) in the east end. There were no holes in the middle. Plaintiff and Latvala together examined

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the west end holes and found them all right to blast. Santi and Rusciolelli did the same with the holes in the east end. One of the men from each end (evidently Santi and Latvala) counted the holes and told Maki and Holm that they needed 14 exploders. There were 14 holes in all to be blasted. Maki and Holm went up to the surface for the exploders and dynamite and there prepared 14 exploders, got the necessary dynamite, and put them (in the box) in the bucket, and went down the shaft. Holm got off at the seventh level. Maki continued down to the last set and then went up with the signal wires. The bucket continued to the bottom. Plaintiff and Latvala together charged the five holes on the west end. Santi and Rusciolelli charged those on the east end; Santi putting the exploders and dynamite in, and Rusciolelli tamping the dynamite. The holes were charged in the customary way. All of the holes in the east end were within 3½ or 4 feet from the east end. When the holes were charged, Santi and Latvala told Rusciolelli and plaintiff that they would put the dirt on the holes, and went about doing so in the customary manner, and plaintiff and Rusciolelli went up on the truck. The ladder was then placed on the sets. At this time Santi was in the bottom in the east end, Latvala in the west end, plaintiff and Rusciolelli on the truck, Maki 40 feet up the shaft, and Holm on the seventh level.

"When Santi and Latvala were all ready to blast, they directed Maki to give the fire signals, and he did so. Santi and Latvala had their candles all ready to light the fuses. When Maki had given the fire signal he told them so. Santi and Latvala then asked each other if they were all ready, if all the fuses were split, and if they had them in their hands. They each said they were ready, and they lighted their fuses all together in the customary way; Santi lighting those in the east end and Latvala those in the west end. Santi was facing east and was right on the east side of the bucket and the holes were east of him, when he lighted the fuse. It took them two or three seconds to light the fuse. Just as soon as they lighted the fuses, they told Maki to give the signal to hoist the bucket, and he immediately started to do so. He rubbed the bare ends of the wires (which were then clean and bright) together seven times in the custom-

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ary manner. At that time Santi and Latvala were getting on the bucket. The bucket was not started. Then they said to Maki, 'What is the trouble? Ring again.' He told them that he had rung, but would ring again, and he did then ring again. The bucket did not start when he rang that time either. After that Santi, who was standing on the side of the bucket, hollered, 'Fire in the powder! Ring up quick!' Maki answered that he had rung already, but would ring again, and he did ring again the third time, but the bucket did not start. The fire referred to by Santi was a fire about two feet square which was then burning in the east end of the shaft. It was six or seven feet from the bucket. Nothing but the fuse was burning in the west end of the shaft. Maki, when attempting to give these signals, counted that he gave the seven bells. He was sure that he did so the first and second times. It was about three minutes anyway between the time he rang the first of those three seven-bell signals and the time of the first blast.

"An explosion occurred in the bottom of the shaft about the time when Maki finished giving the third of the seven-bell signals. The bucket did not start until after the first blast, or until at least three minutes after the first of the seven-bell signals was given. There was a delay of several minutes more than usual. The truck was not hoisted until about five minutes after the first blast occurred. Benny, the engineer of the puffer at the time, testified that only two 'dings' of the bell in the engine house, with an intermediate quivering of the hammer, resulted from Maki's efforts to give all those seven-bell signals. There was a conflict in his and the miners' testimony respecting the time of starting the bucket. Benny claims that after he had raised the bucket two or three feet, he felt a jar, which he ascribed to an explosion in the shaft.

"Neither plaintiff nor Maki saw, were told, heard, or knew that there was any missed hole or holes in the bottom of the shaft that morning, and plaintiff did not know of any danger from missed holes until the time of the blast. Neither of them was over in the east side of the shaft that morning. No dynamite was left in the shaft that morning by anybody in plaintiff's crew except what was put in the holes.

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Shortly after the first hole blasted, the others commenced and continued to go off; the last hole going off when Maki, who climbed up, reached the tenth level.

"Rusciolelli got into, and plaintiff was trying to get into, the twelfth level when the first blast occurred. Santi and Latvala were killed, the plaintiff was frightfully and permanently injured, Rusciolelli was nearly smothered, and Maki was injured, as a result of the explosions. The blasts occurred about 10 o'clock a. m. Holm climbed down from the seventh level to assist the men in getting out. A man came up on the skip from the seventh level to surface and reported the accident, and Benny was then at the shaft and very much discouraged.

"The testimony of defendant's master mechanic shows: That this puffer engine was an old, second-hand one, purchased from the Chicago House Wrecking Company. In May, 1909, one of the teeth fell out of the gear and dropped in between two wheels and caused the bending of the shaft, which affected the throw of the valves, made the engine lame on one side, caused it to run in a jerky manner, and caused the friction to slip. The puffer was in bad condition all the time he was there after May, 1909. Although an attempt was made to repair it and straighten the shaft, the shaft did not stay straight, and the engine never worked well afterwards. Frequent complaints were made to him of the bad condition of the engine before September 17, 1909, and about twice a month he called the superintendent's attention to the bad condition of the engine, and advised a new shaft and gear wheel, but nothing was ever done about it; the condition of the pipe line which carried steam to the puffer (which was 600 or 800 feet long and had 13 quarter-turns in it, when it should have been straighter and shorter) was such that water would accumulate in the cylinder, and the engineer had to be very careful in starting, and start slowly, in order not to knock out the cylinder head.

"Benny, although claiming otherwise at times, admitted that the puffer was not in right condition; that it would start quick at certain places; might jerk; was not in good shape; did not work as it was supposed to; was out of repair; did not run very steadily;

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and that he had to use more than ordinary care and time in starting it with men on it for fear of hurting them. On cross-examination by defendant's counsel (referring to the time of the accident), he testified:

"'Q. Was the engine prevented in any way from immediately beginning to work by any condition of its boxes or bent shaft?
"'A. Yes, sir.'

"The spring and magnet of the bell used in connection with the truck and bucket were not covered with a removable cover, but were wholly uncovered. They should have been so covered. Such a bell is a complicated piece of machinery and requires constant attention and inspection to keep it in condition, and should be thoroughly inspected at least once a week and casually looked over every day to see that there is no dirt at any place where it might affect it; to see that the wires are in proper condition, that the springs are not too tight or too loose, and that there is no corrosion in the base of the clapper or elsewhere which would be liable to interfere with the working of the bell; to see that the platinum point is not burned through where the contact is, that there are no loose contacts, that the coil of the bell does not get open, and that there is no give to the springs. The coils should be sharply looked over at least once a week and kept clean by passing some sharp instrument over the ends of them. Dirt and corrosion might be in such a place, or in such a state or condition, in the bell, or so caught or accumulated in the bell, as to at any time temporarily put the bell out of order so that it would not respond for a few minutes, and afterwards would respond. That the bell rings clearly would not justify failure to test and examine it. If the bell was not carefully inspected once a week in the manner above stated and looked over every day, the chances are that the bell would fail to respond. Without a cover and this examination and inspection, the bell would be unsafe to use for the purpose for which the bell in question was used. The bell might also fail to act, when the bell itself was in good condition and proper connections were made at the bare ends of the wires, by reason of the condition of the wires in the shaft. The batteries should also have been frequently tested with a voltmeter and ammeter

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to get their strength and amperage. It would not be safe to operate the bell in question without the precautions hereinbefore outlined. Witness Benny was the only one to whom the duty of inspection of the signaling apparatus was intrusted. He did not know much about a bell or when or how to inspect a bell. He never examined this bell or signaling apparatus at all except when it failed to act. He did not look at the bell at all in the way of examination or inspection for at least a month before the time of the accident to plaintiff. Nobody inspected the wires in the shaft at all. Some days the bell rang weaker than others. It was bucking both before and after the accident. It was bucking, and Benny had trouble with it, four or five days before the accident. It wiggled and did not ring right. The hammer would not strike against the gong and it was not tight enough. Nobody inspected the batteries until they played out entirely. Plaintiff, before the time he was hurt, never noticed and was never warned or informed of any defect in the hoisting or signaling apparatus."

In a few instances counsel for appellee in their brief have questioned the accuracy of certain portions of this statement and have referred the court to pages of the record claimed to support their objections. The witness Benny, the engineer, whose duty it was to operate this hoisting apparatus in response to signals on the electric bell in his room, given to him by the miners working at the bottom of the shaft, was an employee of defendant company. He was called by plaintiff for cross-examination under the statute. A careful reading of his testimony discloses that the portions of the statement of facts of plaintiff, objected to, which refer to him are supported by his testimony, and that as to the other portions objected to, which would require too much space for extended comment, they are all fairly supported by the testimony.

In the examination of this record the fact must be kept constantly in view that a verdict was directed by the court against plaintiff, and the rule that the

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evidence presented on the part of plaintiff must be considered in the light most favorable to him must be applied.

The question to be determined by this court is not as to to the weight of the evidence produced on the part of plaintiff but whether there was evidence which should have been submitted to the jury for consideration.

In the opinion handed down in this case when it was here upon demurrer, as cited, *supra*, where the construction of the first count of the declaration was under consideration and the issue presented by the pleading was stated, Chief Justice OSTRANDER, speaking for the court, said:

"With regard to the hoisting apparatus the declaration appears upon analysis to be sufficient to warrant the introduction of testimony and to support a recovery in accordance with the following construction which we place upon the language employed. The defendant had furnished a single method of conveying men to and from the seventh level [bottom of the shaft] of the mine. A part of the apparatus and machinery was the one for signaling, by the use of which men in the mine might convey to others on the surface notice of a desire to be taken from the mine or from the particular level. It was the duty of defendant to maintain all of this apparatus and machinery in a condition suitable to prompt action and service, and a duty to promptly respond to signals indicating that the men on the seventh level [bottom of that shaft] desired to leave that level [place]. Proper signals were given, or were attempted to be given, by means of the apparatus provided, upon the occasion in question, by plaintiff or by some of the men with whom he was employed. They were not responded to. The failure to respond contributed to plaintiff's injury, because he was thereby prevented from avoiding or escaping the results of an explosion. The failure to respond was due to some fault, defect in, or some failure of the machinery and apparatus described. We think plaintiff is not required to point

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out the particular fault, defect, or cause of failure. He could not be reasonably expected to know whether the signals were received at the surface—whether the apparatus for signaling failed, or whether an employee disregarded them if received, or whether in attempting to send the cage, or car, for the men, in answer to the signals, some part of the other machinery or apparatus was found to be defective or otherwise at fault. * * * All crews used explosives. It was the duty of defendant to notify plaintiff if the members of another crew left explosives in the shaft, because, if such notification was not given, there would exist an unknown, and perhaps undiscoverable, hazard to which plaintiff should not be exposed. This is the reasonable meaning."

The opinion further stated:

"But this construction is the one to which plaintiff should be limited in the introduction of testimony, and indicates the issue presented by the pleading to which plaintiff is restricted."

No question has ever been raised as to the sufficiency of the second count, which in substance avers the defendant's duty to furnish plaintiff reasonably safe means of egress from the shaft at all necessary times and to convey plaintiff to a place of safety at any time of danger from explosions, and that it undertook to perform this duty by providing hoisting and signaling apparatus and devices. A failure to perform each of these duties was duly assigned. No questions now arise upon the pleadings.

It will be unnecessary to quote at length the reasons given by the court in directing a verdict against plaintiff, nor will it be necessary to discuss at length all of such reasons. If the court was in error in any of its conclusions, plaintiff is entitled to a reversal.

We will first consider plaintiff's contention that there was evidence in the case to submit to the jury upon the question of negligence charged against defendant in failing to maintain the signaling ap-

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paratus in a condition suitable to prompt action and service, and the relation of such negligence to plaintiff's injury. The accuracy of the portion of the statement of facts which covers the condition of the signaling apparatus and its operation, and what was done by the workman Maki in making the signals, is only questioned by counsel for defendant as to the following sentence:

"Because the signaling apparatus could not be relied on, Benny, the engineer, was instructed by defendant to hoist on any signal after the long bell."

These objections have all been considered generally, but this is a very important matter bearing upon the unreliable condition of the signaling apparatus known to defendant and requires specific consideration. We find in Benny's testimony, referring to these instructions, which he at times speaks of as an agreement, the following:

"*Q.* Then why did you make this agreement to hoist on any other signal?
"*A.* It was an agreement that perhaps it would not ring right sometimes.
"*Q.* You could not rely on the bell?
"*A.* Sometimes on the bell, sometimes perhaps it was the ring.
"*Q.* You could not rely on the bell?
"*A.* I could not rely on the ringing either.
"*Q.* You could not rely on the bell or the ringing?
"*A.* No, sir. * * * We made this agreement to hoist upon any bell after that long, long bell before I started to work. Those were my instructions before I started to work."

Whatever modification he may have made as to any of his testimony is of no importance in determining whether there was evidence to support plaintiff's contention.

The portion of the statement of facts, objected to above, gives, we think, a fair inference to be drawn

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from this testimony. Upon the question of the condition of this signaling apparatus, there was testimony of this witness tending to show that during the time before this accident, while he operated this puffer engine to hoist the men who were doing blasting at the bottom of the shaft, upon signals given from below, the bell was more or less uncertain and unreliable in its operation, and at the time of the accident that after the long signal the three seven-bell signals testified to as given from the bottom of the shaft were not transmitted. Benny testified that one bell came, and then the clapper quivered, and then the second "ding." His words are:

"It just went 'ding' and then the hammer of the bell trembled and did not make any sound, didn't strike the bell, and after a pause it struck hard enough to make another 'ding.' There were two 'dings.'"

There is evidence that an electric bell should be covered to keep out the dust, and that it should be inspected frequently to ascertain its condition; that the screws will jar loose and it will not answer signals. There is evidence in this record tending to show a lack of proper inspection. It tends to show that Benny, who knew nothing about such apparatus, who was the one who ordinarily inspected the bell, never paid attention to it unless something went wrong.

The testimony relative to giving the required signals from 40 feet above the bottom of the shaft is not disputed and tends to show that the uncovered ends of the copper wire were bright and that all of the signals were attempted to be accurately transmitted. Therefore it cannot be said, in our opinion, that there was no evidence to submit to the consideration of the jury upon the question of the imperfect condition of the signaling apparatus.

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We will next consider the claimed negligence of defendant in not maintaining the hoisting machinery in a suitable condition for prompt action and service to protect these miners from injury when blasts were being fired. That such a duty rested upon defendant is not disputed, but it is contended on the part of defendant that there is no evidence in the case tending to show that the hoisting apparatus was in an unsuitable condition, or that, if it was, such condition contributed to plaintiff's injury. It is admitted, and was so found by the trial court, that the puffer engine which operated the hoisting apparatus was a second-hand engine, "that it was old, and that the company had had warning that it was somewhat out of repair; in fact, the company made some repairs on it, at least one defect, the bent shaft, having been repaired." The contention on the part of plaintiff is that there is evidence in the record tending to show that it would not operate quickly because, by reason of the bent shaft, it was "lame" on one side; that one of the valves was slow, and that it required to be started slowly; that by reason of its defects the parts connected with the shaft must be in a certain position or it could be started only with difficulty; that at the time of this accident there was a delay of about three minutes before the engine started after the first seven-bell signal, which delay was recognized on the trial by counsel for defendant in a request to direct a verdict against plaintiff for contributory negligence in remaining in a place of obvious danger for a period of three minutes. In our opinion this contention is sustained by the record, and there was evidence upon the question of the condition of the hoisting apparatus to be submitted to the jury.

The record shows without dispute that the foreman of each shift was required to give warning to the succeeding foreman if missed holes had been left in the shaft. It is contended by plaintiff, and the record

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supports the claim, that there was evidence tending to show that plaintiff's crew left no explosives in the shaft after the blast which caused the injury had been prepared for firing, and that there was evidence tending to show that, after the fuses were fired for this blast, explosives in the bottom of the shaft took fire and are claimed to have contributed to plaintiff's injury by prematurely exploding the blast. This was relevant to the question of a safe place and the presence of latent danger not disclosed to plaintiff and his crew. It should have been submitted to the jury.

It is contended by plaintiff that the negligence of the foreman of the preceding crew and of plaintiff's crew, to whom was delegated the duty to warn plaintiff and other members of the crew of explosives left in the bottom of the shaft, and also the negligence of the operator of the hoisting apparatus, was the negligence of defendant; that the duty to warn and the duty to promptly operate the hoisting apparatus when signaled were nondelegable duties, and the persons empowered to perform such duties were vice principals and not fellow-servants of the plaintiff.

The fundamental principle that it is the duty of the master to furnish a safe place for the servant in which to work is thoroughly settled, as is also his duty to continue to keep the place safe, and—

"That this duty is one which cannot be delegated by the master so that the employee engaged to do the work of making the premises safe is to be treated as a fellow-servant of those who are employed and engaged in the general work for which the premises are intended." *Beesley* v. *F. W. Wheeler & Co.*, 103 Mich. 211 (61 N. W. 658, 27 L. R. A. 266).

Numerous decisions of this court to the same effect might be cited. See, also *Orso* v. *Engineering Co.*, 164 Mich. 568 (129 N. W. 673), and cases cited.

The other proposition is that the engineer, whose duty it was to operate and control this hoisting ap-

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paratus, upon which these miners were required to be lifted from their working place to escape imminent danger, was a vice principal and not a fellow-servant. These miners, including plaintiff, were working under contract at $25 per foot. As appears in the statement of facts, which is not disputed, each shift was provided with a shift boss, chosen, paid, and discharged by the employer without consultation with them, and each shift boss was required to warn and notify the boss of the succeeding shift as to explosives left by his shift. Under the circumstances of this case, therefore, the relation of plaintiff to such engineer and shift boss was not that of a fellow-servant. The engineer and the shift boss performed for the master the nondelegable duty of keeping safe the place where the work was performed. *Courtois* v. *Paper Co.*, 172 Mich. 305 (137 N. W. 699), and cases cited. The nondelegable duty of the shift boss was to prevent plaintiff from being kept in ignorance of and exposed to an unknown hazard. The engineer's nondelegable duty related to the prompt operation of the hoisting apparatus and to obey his instructions relative to signals. The signaling apparatus, the engineer, and the hoisting apparatus were the instrumentalities provided by the defendant, under its contract, in maintaining a safe place for plaintiff to work and removing him from imminent peril necessarily incident to the employment when plaintiff so required.

It is apparent that under the contract of employment the duty of the defendant to the plaintiff to continuously provide him a safe place in which to perform his work could only be fulfilled by the performance of such duty by means of signaling apparatus, the engineer, and the hoisting apparatus, and a failure in any respect in such performance, for any reason, by any of these instrumentalities, would of necessity be a failure in the performance of an absolute duty imposed upon the employer. It is not disputed

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that these instrumentalities were absolutely necessary for the safety of the plaintiff in the prosecution of his work. They were the only instrumentalities provided by defendant for that purpose, and their prompt and efficient operation was included in the contract of hiring. This court has frequently affirmed the principle here involved.

In the case of *Kaukola* v. *Mining Co.*, 159 Mich. 689, at page 699 (124 N. W. 591), Mr. Justice STONE, speaking for the court, said:

"The lighting of this passageway or thoroughfare of the mine, far distant from the working place of those who passed through them—it being always dark in the mine—was just as necessary for the safety of the men as it was to have the walls and floors in a proper condition. It was one of the 'instrumentalities' which it was necessary to provide to enable the men to do their * * * work safely. It was a thing which it was necessary to keep permanently in condition. Unlike the case of *Livingstone* v. *Plate Glass Co.*, 146 Mich. 236 [109 N. W. 431], here the place furnished was a permanent place of work, and not one where the conditions were constantly changing. Here, in our opinion, the rule of a safe place to be furnished by the master applies. In *Cristanelli* v. *Mining Co.*, 154 Mich. 423 [117 N. W. 910], it was held that the engineer of a mining hoist, in so far as it is his duty to keep the place safe, is not the fellow-servant of an employee engaged in loading machinery upon the skip at the collar of the shaft."

There is evidence in the case on the part of plaintiff tending to show the negligence of the engineer, who operated this hoisting apparatus, in not acting promptly on receiving the first stroke of the bell he was waiting for, both in his own testimony and the testimony of the miners at the bottom of the shaft. The engineer's negligence was a question of fact and, if established, was the negligence of a vice principal to be imputed to the defendant. This question should also have been submitted to the jury.

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For the reasons stated, the trial court was in error in directing a verdict in favor of defendant.

The judgment of the circuit court is reversed, and a new trial ordered.

STEERE, C. J., and MOORE and KUHN, JJ., concurred with MCALVAY, J.

OSTRANDER, J. I agree with my Brother MCALVAY that there was sufficient testimony relating to the condition of the signaling apparatus and the hoisting machinery to carry the case to the jury. There was some testimony also favorable to plaintiff upon the subject of a latent danger arising from the fact that dynamite was left in the chamber by a crew of men which plaintiff's crew followed in their work. For these reasons I concur in reversing the judgment and granting a new trial. But that any doctrine of the law of safe place is involved in this case, or that the engineer hired by the defendant was its vice principal, who in managing the hoisting machinery was performing a nondelegable duty, are propositions advanced by Brother MCALVAY which, in my opinion, cannot be sustained. It is not alleged in the declaration that the engineer was an unskillful or incompetent servant. It is not alleged that, having the right to be furnished a safe place in which to work, the men were furnished an unsafe place. On the contrary, it is the theory of the plaintiff that, being set to work in a place which by his labors and those of his fellow workmen was from time to time made unsafe, a place to flee from, it was the duty of the defendant to provide a certain and speedy means of leaving the place. It is alleged that apparatus for this purpose was provided, but that it was infirm and in the particular instance was operated so tardily that the means of self-destruction, which plaintiff and his fellows had set in motion, anticipated the opera-

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tion of the apparatus intended for their escape. The fault charged to the engineer in this case is not the failure to inspect or to install suitable apparatus or to keep that installed in repair. So far as his conduct is concerned, the case would be the same if it appeared or was admitted that the apparatus provided by defendant to take the men away from danger was perfect and in perfect order and he a competent man, who tardily, so tardily as to indicate negligence on his part, obeyed the signal. Unless upon a finding of these facts defendant's negligence would be held to be made out, the negligence of the engineer is not a ground for recovery. The work he performed, and should perhaps have performed more promptly, was the work of operating the mine. Suppose that, instead of hoisting these miners in a cage, defendant had provided a track and cars and a locomotive which, in the charge of a competent crew, stood near the chamber in which the blasting was done and to which the men, after lighting the fuses, repaired and were drawn away from danger. If upon an occasion the engineer so tardily responded to signals to move the train that some of the men were injured by the blast, would it be held that his negligence could be imputed to the master; that the duty in the premises was nondelegable; that in performing it he was a vice principal? I grant that in this case the necessity for prompt action on the part of the engineer existed; that the agreed signal was a notice of peril; and that the duty of the engineer was a most important one. Not less important was the duty of each miner to properly light his fuse and of one of them to give the necessary signal to the engineer. The defendant is not held as an insurer that none of those employed in the operation would act in a negligent manner. If defendant used suitable apparatus, kept it in order, and employed in its operation a trustworthy, competent engineer, it had performed its duty.

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In *Layzell* v. *Coal Co.*, 156 Mich. 268 (117 N. W. 179, 120 N. W. 996), in considering the duty imposed upon owners of coal mines by a statute which required "that only a competent and trustworthy engineer shall be permitted to operate the cages and hoisting devices in all coal mines in this State," in which plaintiff claimed to have been injured by the negligence of one performing the indicated duty, the court declined to go farther than I have herein indicated. See, also, *Walkowski* v. *Consolidated Mines*, 115 Mich. 629 (73 N. W. 895, 41 L. R. A. 33).

BROOKE, STONE, and BIRD, JJ., concurred with OSTRANDER, J.

MORONEN v. McDONNELL.

1. MASTER AND SERVANT — PERSONAL INJURIES — NEGLIGENCE — MINES.

The relation of master and servant had ceased to exist, as between his employer and plaintiff, who had been working as a laborer in a quarry and had stopped at noon to eat and rest, seating himself on the ground beside a public highway, knowing that blasting was being done near by, and who was struck by a piece of rock thrown by a blast; the fellow-servant rule and doctrines of safe place and duty to instruct were not applicable.[1]

[1] The question of injury to servant on master's premises before, after, or between hours of work is treated in notes in 12 L. R. A. (N. S.) 853 and 23 L. R. A. (N. S.) 954. And for effect upon master's liability for breach of statutory duty of fact that employee was resting at the time of injury, see note in 22 L. R. A. (N. S.) 309.

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2. SAME—TRESPASSERS—DUTY TO WARN.

Plaintiff not being a loiterer or idle intruder, it was defendant's duty to give timely or reasonable warning of the firing of blasts.

3. SAME—EXPLOSIVES.

In blasting out rock for use in a stone crusher, defendant was chargeable with the requirement of "reasonable care, commensurate with the attendant dangers, and with the duty to" cover or protect the blasts or give persons near by timely warning of the explosion.[1]

4. EXPLOSIVES—DUTY TO COVER BLAST.

Reasonable precaution did not demand that defendant should cover a blast occurring 500 feet from any house, if sufficient warning was given to any persons in the immediate vicinity.

5. MASTER AND SERVANT—WARNING—PERFORMANCE OF DUTY TO NOTIFY SERVANT OF EXPLOSION.

Where blasting had been carried on for three seasons without injury to person or property under the system adopted by defendant, and he employed competent men to perform the work, who gave notice by repeated calls of setting off explosions or blasts, who, in the instance in question, went both ways down the highway, one of them going within 50 feet of plaintiff and the other workmen resting in a place that they considered safe from the expected blast, defendant was not negligent; nor was the situation materially affected by the fact that plaintiff relied on the judgment of his fellow workmen in choosing the place, not having had so much experience as they.

6. SAME.

And where plaintiff had warning of one blast without taking any precautions, or attempting to avoid it, an omission to repeat the warning in the case of a second blast, not inducing plaintiff to remain or to incur additional peril, was not such negligence as to raise an issue for the jury.

Error to Gogebic; Cooper, J. Submitted April 24, 1913. (Docket No. 40.) Decided September 30, 1913. Rehearing denied June 4, 1914.

[1] As to liability for injury to person or property from concussion caused by blasting, generally, see notes in 12 L. R. A. (N. S.) 389 and 27 L. R. A. (N. S.) 425.

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Case by John Moronen against Patrick McDonnell for personal injuries. Judgment for defendant upon a directed verdict. Plaintiff brings error. Affirmed.

O'Brien & Le Gendre and *George O. Driscoll,* for appellant.

James A. O'Neill, for appellee.

STEERE, C. J. This is an action of trespass on the case instituted in the circuit court of Gogebic county January 24, 1911, to recover damages of defendant for personal injuries resulting to plaintiff from being struck on July 22, 1910, by a piece of rock thrown from a blast of dynamite at a quarry where defendant was getting out and crushing stone for road construction. At the conclusion of plaintiff's testimony in the trial court, a verdict was directed for defendant, chiefly on the ground that plaintiff, by his own evidence, was shown to have assumed the risk, having himself selected the place where he was injured and stopped there to dine and rest, knowing blasts were being discharged near by. He has now removed the case to this court upon a writ of error to review such ruling.

Defendant was a contractor engaged in paving in the city of Ironwood, and also operated a stone crusher some distance north of the city, on the south side of a hill, where suitable rock for his work was found and convenient to a county road running north from the city. The stone crusher stood near the bottom of the hill on its south side near to a rock face, or bluff, from which rock was blasted for crushing. The blasting was done by two experienced miners who had been especially employed for, and put in charge of, that work. A crew of laborers, of mixed nationality, varying from 18 to 26 in number, was employed in tramming, stripping, drilling, and other

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work necessary to carry on the undertaking. The rock was moved from the place of blasting to the crusher by tram cars, run on tracks laid for that purpose, as occasion required. At the time of the accident in question the place of excavation was about 180 feet north from the crusher and about 175 feet west from the highway, which ran, curving past the hill, to the north. Plaintiff began work there the morning of the day he was injured, having previously been employed on the contract in the city. During the forenoon he was engaged in stripping or removing the overburden of earth upon the rock, preparatory for blasting, and worked near the men who were drilling holes in the rock for that purpose.

Owing to the distance from their places of residence, the men working there carried their dinners with them. The blasting was done, by the men in special charge of that work, twice a day, once during the noon hour, while the other laborers were away eating their dinners, and again after quitting time in the evening. The men worked from 7 a. m. to noon and from 1 to 5:30 p. m.

Plaintiff is a native of Finland and was 49 years of age when injured. He had been in America about two years and spoke little, if any, English. Several of his countrymen worked in the crew, with whom he could and did converse.

During the noon hour the men were released from their work as usual and went where they pleased to eat their dinners. At 12 o'clock dinner was called, and at the same time a warning was given by a cry of "fire," the customary call when blasts are about to be set off. Thereupon all the men, except those in charge of the blasting, being at liberty until 1 o'clock, took their dinner pails and went some distance away for safety, and wherever they chose, to eat their dinners. Plaintiff took his dinner pail and went with the rest. They went around to the north side of the

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hill, about 350 feet from the place of blasting, and stopped at a spot where the men regularly ate their dinners, beside the highway on a little path, used as a short-cut at a turn in the road, where were some bushes and small trees. This was a favorite and customary place where many of the men had regularly eaten their dinners under like circumstances, without accident, not only during that season but for two previous seasons while the work was in progress there.

An intelligent witness of plaintiff's, a fellow countryman, who worked on the crusher, testified, among other things, that there were about ten Finns in the crew; that most of the men ate their dinners at that place, while the blasting was done during the noon hour, saying:

"It was about the same place where the boss ate his dinner, but the Finns was in a certain place and the boss with some English-speaking workmen was eating a little ways from there. * * * Taking from the place of the crusher the boss and the men was exactly the same distance from it."

This witness also testified that he had handled dynamite in the old country and was familiar with its use, knew it was dangerous to be right by when they were blasting, and in such case the men—

"Go away to a place where they think they are safe and then they stay there and eat their dinner; they want to go to a safe place. * * * I thought it was safe all the time I was there. * * * If I thought it was not safe I would have gone further. * * * I have known Moronen about three years next June. * * * We both went to dinner together. He went where the rest of the Finns went and he thought he would be safe where the rest of them were safe. * * * He didn't say anything, but when he saw the rest run he ran after, and then when he got over there he asked if that was the place to take dinner. * * * I am a man of experience, * * * but in this certain place I didn't know to

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be afraid because there never was any rocks flying before."

The foregoing quite clearly discloses the circumstances under which, and reason why, plaintiff selected the place where he was injured to eat his dinner. He knew he was at liberty to go where he pleased during the noon hour, and he knew there was to be blasting. He inquired of his more experienced countrymen and selected that place in order to be with them, evidently depending more or less on their judgment. He testifies:

"When they hollored 'fire' I knew what that meant; the fellows told me they was going to blast. * * * When we started for dinner they blasted, and after we was through with our dinner they blasted. * * * I was sitting down with the dinner pail between my legs when the first blast went off. * * * I just wanted to get away from the flying rocks and I went to eat my dinner with the other fellows. I went away because I wanted to get away from the flying rocks. Yes, I could have gone as far as I wanted to —as far as I thought it necessary to go to be safe. If the other fellows went farther out I would have gone, but I did not know rocks would fly that far. I just went where I did because somebody else went."

His inexperience apparently put him to no disadvantage compared with those who had previously worked there. That was the third season the men had eaten their dinners at that place while blasting was going on, without injury, and they thought it safe. In this instance they were manifestly in error, for, though several blasts had been fired while they were sitting there that day, a blast fired between 12:30 and 12:45, as plaintiff sat in a reclining position, after concluding his meal, threw a piece of rock "bigger than a strong man's fist," so that it struck him on his right leg, inflicting a serious wound, which necessitated a surgical operation and permanently crippled that member.

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Plaintiff's declaration contains two counts; the first alleging and based upon the relation of master and servant, charging negligence and failure of duty in not providing plaintiff a safe place in which to work and eat his dinner, failure to instruct and give warning, and failure to properly protect the blasts. The second count is apparently based on the theory that such relation was suspended during the noon hour, but that defendant was negligent in firing dynamite in that locality, with workmen in the vicinity, without guarding and covering the blasts, and in not giving proper notice and warning such as—

"Defendant would have been reasonably bound to have used and exercised for the safety, protection, and benefit of any third person (not in defendant's employ) who was or might be engaged in eating his dinner and reposing at the place where plaintiff was eating his dinner and reposing at the time plaintiff was injured."

During the noon hour, from 12 to 1 o'clock, plaintiff and all the other employees, except those in charge of the blasting, were not on duty, were at liberty, free to go wherever and do whatever they pleased. Plaintiff fully understood this. They were, for that time, dismissed from service. They were not at defendant's plant, nor in charge of any of his property, nor under his orders, nor on his premises, but on the highway, at a location they had selected some distance away from their employment. We think, in the light of the following authorities as applied to the circumstances of this case, plaintiff was neither, at the time of the accident, engaged in a common employment with the other workmen so as to be a fellow-servant with them nor did the relation of master and servant exist between him and defendant, in the strict sense requisite to make applicable the fellow-servant rule or the doctrine of safe place and duty to instruct due from master to servant. *Dickinson* v. *Railway*

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Co., 177 Mass. 365 (59 N. E. 60, 52 L. R. A. 326, 83 Am. St. Rep. 284); *Mirabile* v. *Murphy Co.*, 169 Mich. 522 (135 N. W. 299); *Broderick* v. *Depot Co.*, 56 Mich. 261 (22 N. W. 802, 56 Am. Rep. 382); Baldwin on Personal Injuries (2d Ed.), § 374.

Plaintiff's relations with defendant, however, required him to be in the vicinity of the place of his employment, conveniently near to resume his labors when the noon hour expired. He was not a loiterer nor idle intruder in that locality. Defendant was presumed to know plaintiff and the other workmen were near by, and it was defendant's duty to give reasonable and timely warning of the blasts to those who might be upon the adjacent highway and to the workmen whose employment had brought and detained them in that vicinity. He had a right also to assume that, being at liberty to go where they pleased, they would, on receipt of timely notice and warning, seek a place of safety and avoid the danger.

When using high explosives in carrying on his work, it was the duty of defendant to exercise reasonable care commensurate with the attendant dangers, and either by some proper method, cover and protect the blasts to prevent them from so throwing fragments of broken rock as to imperil the safety of persons near by, or to give them adequate and timely warning of expected explosions in order that they might take proper precautions to avoid injury. *St. Peter* v. *Denison*, 58 N. Y. 416 (17 Am. Rep. 258); *Gates* v. *Latta*, 117 N. C. 189 (23 S. E. 173, 53 Am. St. Rep. 584); *Wright* v. *Compton*, 53 Ind. 337.

If the work is being done in a city or village, or in any other place where adjacent property and the presence of numerous persons render protection by warning impracticable or inadequate, covering the blast might be imperative and its omission would be negligence. In this case the blasting was in the country, with but one house near by, distant some

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500 feet, and a passing highway. Under the methods of conducting the business and system of warning, which were pursued during the three seasons the blasting had been carried on, no injury to person or property was done until the day in question. Competent men of many years' experience were doing this work. They gave ample notice by repeated calls before the firing, and one of them went each way upon the highway to notify and prevent persons from passing while the blasting was being done. One of them named Lindberg, a man of 23 years' experience, testifies:

"Me and my partner had full charge of the dynamite. * * * We set off the powder that day at noon. We hollered 'fire;' both of us gave warning. That duty was put upon both of us by the defendant. * * * So that the workmen would know to get out of the way and protect themselves against injury on account of the blast. * * * We give it before we light, and then we used to holler 'fire' until the first hole went off. * * * If we had two shots we would say two shots and if we had more we said that. * * * I used to go north and my partner south. * * * On the day Moronen was hurt I went on the north side the same way. * * * I did not go so far as the men were. I hollered to them from 50 feet closer to the crusher. * * * I stayed there until the shots went off. * * * I worked there three summers and always did the work the same way."

Under the circumstances of this case, we do not think negligence can be predicated on failure to cover the blast, provided proper notice and timely warning were given.

That a warning was given at the noon hour when the men were released for dinner, and that plaintiff heard it and knew, or learned at once, its import is undisputed. He testifies that he knew what it meant, and he went away because he wanted to get away from the flying rocks; that he went as far as he

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thought it necessary to be safe, and if the other fellows went further he would have gone; he also says that he did not know the rocks would fly that far, and the evidence shows the others did not, and from their experience they believed they would not.

It is claimed for plaintiff that it was the duty of defendant to give an adequate and distinct warning of each blast. He, with one of his witnesses, testified that, when the later blast, which inflicted the injury, was fired, no warning of it was given, and that they did not hear any warning. This would raise an issue of fact under the evidence for the jury to decide if controlling or material. Authority is cited to the effect that such repeated warnings should be given; and this is the rule where omission to give them makes any difference in plaintiff's conduct or leads him into greater peril; but in this case plaintiff, with notice of the proposed blasting, had selected his place of retreat for the noon hour with his fellow workmen at an accustomed spot which they believed safe from the blasting. He had the warning which he acted on in going there, and he remained there believing it to be safe. It is difficult to conceive how a failure to repeat the warning would or could make any difference under the circumstances. We do not think a failure to submit that question to the jury was error.

There is a marked variance between the pleading and proofs, which defendant insists is fatal, in the particular that the declaration alleges plaintiff "carried his midday meal or dinner to his said working place and remained at said last-mentioned place during the noon hour, and there during said noon hour, ate his midday meal, rested and reposed," etc., "and there received his injury," while his evidence shows that he was 350 feet from there on a public highway, where he had gone to avoid the blasting at said working place, presenting a different state of facts involving different questions of law. While this presents

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a somewhat serious technical question of pleading which might otherwise demand further consideration, we conclude that upon the vital issue of defendant's actionable negligence he is shown to have given plaintiff notice, which was understood, of the proposed blasting, sufficient in time to make retreat to a safe place, with full freedom to go as far and whereever he desired.

Plaintiff was a man of mature years and, apparently, average intelligence. He testified that he was warned and knew there was to be blasting at the noon hour; that he was free to go; and that he left the place where the blasting was to be done in order to get away from the danger and find a point of safety. He selected his place of dining with that in view. That he deferred, in choosing such place, to the judgment of some of his countrymen who had worked there longer and were more familiar with conditions, was natural; but it was nevertheless his selection and makes manifest that he was at no disadvantage in comparison with them, and assumed no greater risks than they, by reason of his inexperience. He says it was on their judgment he selected the spot where he was when injured. The defendant cannot be held responsible for their error in judgment.

Under the facts shown, the learned trial judge rightly decided that plaintiff was given sufficient warning, with abundant time and opportunity to withdraw to a place of absolute safety, and that in selecting his place of retreat he assumed the risk.

The judgment is affirmed.

MOORE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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ACCOUNTING—See CORPORATIONS (2-4); EQUITY (1).

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ADMISSIONS—See CRIMINAL LAW (4); EVIDENCE (1, 4, 11); FRAUD (4); NEW TRIAL (2); PARTNERSHIP (6); WILLS (4); WITNESSES (6).

ADOPTION.

The term "legal heirs," employed in the granting clause of a deed, included the adopted son of the grantee, who took title as if he had been an own child, under 3 Comp. Laws, § 8780 (4 How. Stat. [2d Ed.] § 11640), which provides that the persons adopting "shall thereupon stand in the place of a parent or parents to such child in law and be liable to all the duties and entitled to all the rights of parents thereto and such child shall thereupon become and be an heir at law of such person or persons, the same as if he or she were in fact the child" thereof. *Ultz* v. *Upham*, 351.

ADULTERY—See DIVORCE (4).

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AGENCY—See PRINCIPAL AND AGENT.

ALTERATION OF INSTRUMENTS—See BILLS AND NOTES (3-7).

AMENDMENTS.

1. An amendment of plaintiff's declaration which charged defendant with manufacturing and selling a dyed, fur-lined coat which contained coloring matter deleterious to life and health of the wearer, so as to charge that de-

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AMENDMENTS—Continued.

fendant was engaged in the business of selling at wholesale and jobbing such fur-lined coats, knowing the dangerous or poisonous character of the material used, did not change the identity of the litigants, or introduce a new cause of action, and was a proper amendment. *Gerkin* v. *Brown & Sehler Co.*, 45.

2. But upon defendant's showing that it was surprised by the proposed amendment, asked for at the trial, that defendant had prepared to meet the charge made in the original declaration to which it was a defense that defendant was not acting as manufacturer of the goods but as a jobber, and that it was necessary to procure evidence which defendant could not obtain in time to meet the case made in the amended declaration, the court should have allowed a continuance over the term; a postponement of four days, shown by defendant's affidavit to be insufficient, was not a proper exercise of the discretion of the court. *Id.*

3. Upon the trial of an appeal from a justice's judgment in favor of plaintiff, who brought an action for rent due under a written lease, wherein defendant, the tenant, had orally given notice of set-off and recoupment in general terms, and had defended on the ground that the landlord had failed to repair certain leased buildings as it was stipulated in the lease, and had filed a written bill of particulars of his claim before the justice who in part allowed it, the circuit court should have permitted the defendant to introduce evidence in support of the alleged recoupment, and erroneously rejected the testimony on the ground of insufficiency of the notice of defense. *Carver* v. *Bieleke*, 406.

4. Technicalities and formalities are not countenanced in the review of pleadings in justices' courts: the purpose of pleadings is to inform the parties what they will be called upon to meet, and if sufficient notice is given, objections should not be sustained. *Id.*

5. It was within the discretion of the court, on appeal from justice's court, to permit plaintiff to amend his declaration so as to permit the recovery of the profit he would have made on the purchase of the horse if it had been as represented, the parties having tried the case on that theory and testimony being admitted without objection to show the value of a horse that would correspond with the representations. *Patterson* v. *Gore*, 591.

ANIMALS—See SALES (1); TRIAL (5).

ANOMALOUS INDORSER—See BILLS AND NOTES (3).

APPEAL AND ERROR.

1. For the purpose of determining who the contestants of a will are, and whether they were heirs at law of deceased

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APPEAL AND ERROR—Continued.

within the meaning of Act No. 234, Pub. Acts 1909, the court may rely on the recitals of the writ of error, together with the statements of the will, in the absence of affirmative testimony on the point. *In re Oldenberg's Estate*, 151.

2. In determining whether or not an order is merely interlocutory, its effect upon the rights of the parties is the better test than the particular stage of the proceedings at which it is made: whenever such order divests a legal right, the injured party may appeal to determine whether it is legal or unauthorized. *Earl* v. *Jacobs*, 163.

3. Thus, a court of chancery has no authority to enter an order permitting the trustee in bankruptcy of a stock of merchandise, adversely claimed by a mortgagee under foreclosure proceedings, to sell the merchandise at the request of the complainant, the bankrupt mortgagor, who seeks to enforce an alleged right or equity in the stock. *Id.*

4. Apparently contradictory instructions did not prejudice appellants, against whose contention the point raised should have been determined as matter of law, instead of submitting the case to the jury. *Fidelity & Deposit Co. of Maryland* v. *Maile*, 232.

5. Points not sufficiently brought to the attention of the trial court will not be determined on error. *Id.*

6. Having requested no instructions on the issue as to darkness, etc., in a personal injury action, defendant could not review the court's failure to charge as error. *Amanta* v. *Michigan Central R. Co.*, 281.

7. Technical errors in the admission of evidence and in charging the jury, not shown to be prejudicial, *held*, not reversible, the judgment being small. *Sykes* v. *Village of Portland*, 291.

8. In equitable proceedings by creditors of a railroad corporation for receivership, sale of the corporate property and distribution of the proceeds, after a sale under order of the court, the defendant railroad company had no interest in the proceeds, and its solicitor, having in writing consented as counsel of the receivers to the entry of the decree of distribution, making no objection to it in behalf of defendant, the latter could not appeal. *Gorman* v. *Patrick Hirsch Co.*, 382.

9. The allowance of solicitors' and receivers' fees by the trial court was discretionary and will not be reversed on appeal unless the discretion was abused. *Id.*

10. Objections not brought to the attention of the lower court will not be considered. *Id.*

11. Where complainant filed a bill to enforce a lien for materials furnished in the remodeling and reconstruction of

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APPEAL AND ERROR—Continued.

a building, and defendants contended that under the contract with the principal contractor the entire cost was to be offset against an indebtedness outstanding between the contractor and the defendant in possession, and the final decree determined that no contract, as claimed, was made, as shown by the uncontradicted proofs, and where one of the defendants, a corporation, had taken an assignment of all claims for liens allowed by the decree in the name of its president, such corporation and the defendants who claimed interests in the building could not try the suit on appeal under a stipulation by which it was stated that the contract contained an agreement to offset the said indebtedness to the contractors against the cost: the effect of such stipulation between a portion of the parties, could bind only the parties executing it, and the question presented was in the nature of a moot point, which the appellate court will not review. *Pittsburgh Plate Glass Co.* v. *Charles Klein Co.*, 399.

12. Instructions to the jury that plaintiffs had the burden of proof to establish every allegation by a preponderance of the evidence, was error: the plaintiffs could recover if they proved any one of the several breaches alleged and relied upon. *Eaton* v. *Hope*, 411.

13. Unless there is no evidence to support a finding of fact made by the circuit court in trying a case without a jury, or unless the finding is contrary to the undisputed evidence, this court will not review it. *Fidelity & Deposit Co. of Maryland* v. *Hibbler*, 490.

14. The objection that evidence was incompetent and immaterial did not raise the point for review on error that the witness was not qualified to give testimony upon the question of value of a horse; and where plaintiff bought a horse of defendant which failed to conform to defendant's warranty and received another horse on returning the first, and it was shown that the second horse failed to conform to the guaranty made by defendant, testimony to show the value of the second horse, which plaintiff also returned, was not incompetent or immaterial, within such objection. *Patterson* v. *Gore*, 591.

15. Improper or prejudicial argument of plaintiff's counsel cannot be reviewed unless the record shows that appellant called the matter to the attention of the trial court by objection or request to give instructions. *Id.*

16. Without taking exceptions to the charge of the court, plaintiff was entitled to assign error on the charge to the jury pursuant to Act No. 52, Pub. Acts 1901, 3 Comp. Laws, § 10247 (5 How. Stat. [2d Ed.] § 12960). *Id.* 592.

17. In passing on the correctness of the trial court's action in directing a verdict for defendant, the evidence presented

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APPEAL AND ERROR—Continued.

by plaintiff must be considered in the light most favorable to him. *Panela* v. *Castile Mining Co.*, 669.

See AMENDMENTS (4); CARRIERS (2-4); CRIMINAL LAW (6); EVIDENCE (1, 9, 10); MANDAMUS (1); MASTER AND SERVANT (13); NEW TRIAL (4); PARTNERSHIP (6, 7); TRIAL (1, 3, 7, 12).

APPROPRIATIONS—See HIGHWAYS AND STREETS (4).

ARGUMENT OF COUNSEL—See APPEAL AND ERROR (15); MASTER AND SERVANT (4, 13); TRIAL (3, 5, 12).

ARREST.

1. An affidavit for a capias charging defendant with false representations relative to the value and selling properties of certain real estate was not defective because it did not set forth the fact that the deponent was possessed of knowledge sufficient to render him competent to state his opinion as to its value, where the affidavit averred that affiant had personal knowledge of the facts stated: no question of expert knowledge was involved; any citizen familiar with values might testify or give his opinion. *Pratt* v. *Allegan Circuit Judge*, 558.

2. Where the fact stated in the affidavit is one about which testimony of any person having means of knowledge would be admissible, the affiant need not set forth the source and extent of his knowledge if it contains the general averment that he has personal knowledge of the facts or circumstances stated. *Id.*

See FRAUD (9).

ASSUMPSIT—See PHYSICIANS AND SURGEONS.

ASSUMPTION OF RISK—See MASTER AND SERVANT (6, 7, 9, 10).

ATTORNEY AND CLIENT—See APPEAL AND ERROR (9); EVIDENCE (2).

ATTORNEY GENERAL—See PARTIES.

AUTHORITY OF AGENT—See PRINCIPAL AND AGENT.

AUTHORITY TO REPRESENT—See PARTNERSHIP (3).

AUTOMATIC COUPLER—See RAILROADS (1).

AUTOMOBILES.

Evidence considered, and *held*, to present a question of fact relative to defendant's negligence in colliding with plaintiff's motor car. *Andries* v. *Everitt-Metzger-Flanders Co.*, 111.

See DAMAGES (1); EVIDENCE (1); STREET RAILWAYS (6-8).

BANKRUPTCY.

1. The trustee stood in no better position than the bankrupt

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BANKRUPTCY—Continued.

who commenced suit before adjudication of his bankruptcy and in whose stead the trustee was later substituted as party complainant. *Earl* v. *Jacobs*, 164.

2. On appeal from an order entered in a suit in chancery to adjudicate the title of complainant to a stock of merchandise, after mortgage foreclosure, and bankrupt proceedings against complainant, it was *held*, improper to order the property, which was not perishable, to be sold by his trustee, and the funds held subject to a final determination of the questions involved; defendants' rights, if any, were to the property and not the proceeds of it. *Id.*

See APPEAL AND ERROR (3).

BANKS AND BANKING—See PARTNERSHIP (1, 4, 5).

BENEFICIAL ASSOCIATIONS—See INSURANCE (2); WITNESSES (5).

BILLS AND NOTES.

1. In a suit to enjoin the enforcement of a railroad bond that defendant claimed to hold in due course, the burden rested on complainant to show that defendant was not a good faith purchaser: evidence that the entire issue of bonds, of which the one held by defendant was a portion, had been recalled, canceled, and destroyed by fire, was insufficient to impair defendant's title. *Toledo, Saginaw & Muskegon R. Co.* v. *Peters*, 76.

2. It is presumed that the person presenting a negotiable bond is a bona fide holder, and until evidence is introduced tending to show that it was lost or stolen before he acquired it, or that the consideration for the instrument was illegal, or that the issuance or transfer was induced by fraud, no obligation rests upon him to prove that he is a holder in due course. *Id.*

3. The indorsement of a third person, appearing on the back of a note underneath the signature of the payee, is conclusively presumed to be that of a subsequent indorser, and not that of a joint maker or surety, and the contention that such indorsement of an irresponsible person in no way interested in the note, without the knowledge or consent of the maker or holder, is an alteration, cannot be sustained. Act No. 265, Pub. Acts 1905, §§ 50, 65, 69, 70, 126, 127 (2 How. Stat. [2d Ed.] § 2721 *et seq.*). *Ensign* v. *Fogg*, 317.

4. Pursuant to the provisions of section 50 of the negotiable instruments law, the request of plaintiff's counsel for leave to strike out such indorsement, made at the trial, might properly have been granted. *Id.*

5. In order to have the benefit of the defense of alteration under 1 Comp. Laws, §§ 767, 826 (5 How. Stat. [2d Ed.]

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BILLS AND NOTES—Continued.

§§ 12220, 12273), defendant must deny under oath the execution of the instrument at the time of pleading. *Id.*

6. In the absence of evidence that plaintiff made any change in the terms of the instrument, which defendant claimed showed an alteration, as a bona fide holder, the plaintiff was entitled to recover according to its original tenor. Act No. 265, § 126, Pub. Acts 1905 (2 How. Stat. [2d Ed.] § 2797). *Id.* 318.

7. Where there is nothing suspicious upon the face of an instrument, beyond the fact that an erasure is manifest, the presumption is that any alteration appearing on the face thereof was made before the execution of the instrument. *Id.*

See DURESS (2).

BOARDING CAR—See CARRIERS (1).

BOND OF NOTARY—See PRINCIPAL AND SURETY.

BONDS—See BILLS AND NOTES (1); INDEMNITY (1); INSURANCE (8).

BREACH OF WARRANTY—See DAMAGES (3).

BURDEN OF PROOF—See APPEAL AND ERROR (12); BILLS AND NOTES (1).

BY-LAWS—See CORPORATIONS (6, 7).

CANCELLATION OF INSTRUMENTS.

Although the finding of the circuit court in chancery that the defendants obtained a valid title to complainants' farm by a deed conveying the land subject to a life estate in complainants and in consideration of their support upon the premises, is affirmed, the decree should be modified so as to permit complainants, at their election, to waive the right to support on the premises, retaining the use thereof as life tenants. *Nye* v. *Fonger*, 620.

See DEEDS (2); FRAUD (5, 7).

CAPIAS AD RESPONDENDUM—See ARREST; FRAUD (8, 9).

CARRIERS.

1. Testimony in plaintiff's behalf that the decedent attempted to board defendant's car while it was standing, that, as he put his foot on the steps, the car started with a jerk, throwing him under the wheels and fatally injuring him, although defendant's testimony tended to contradict the claim that the car was standing still, sufficiently presented a question for the jury. *Goodyear* v. *Detroit United Ry.*, 129.

2. The testimony of the witnesses, being in dispute, was for the jury to weigh and the court rightly denied a motion

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CARRIERS—Continued.

for a new trial on the ground that the verdict was contrary to the weight of the evidence. *Id.*

3. *Held*, also, that the court properly refused a new trial on the ground of newly discovered evidence which appeared to be merely cumulative and was not likely to change the result. *Id.* 130.

4. The discretion of the trial court in denying a new trial for the reason that new evidence has been discovered, will not be disturbed, on appeal, unless a clear abuse thereof appears. *Id.*

See NEGLIGENCE (7).

CHARACTER—See WITNESSES (3).

CHASTITY—See WITNESSES (3).

CHILDREN—See EVIDENCE (8-10).

CITIZENSHIP OF SALOON KEEPER—See INTOXICATING LIQUORS (1).

COMMON LAW—See EXPLOSIVES (1).

COMPETENCY—See DEEDS (1).

COMMON CARRIERS—See CARRIERS.

COMPETENCY—See WILLS (3).

COMPROMISE AND SETTLEMENT—See DURESS (2); EVIDENCE (4).

CONCEALMENT OF FACTS—See FRAUD (7).

CONCURRENT INSURANCE—See INSURANCE (1).

CONDITIONAL SALE—See EQUITY (1).

CONDITIONS OF POLICY—See INSURANCE (9).

CONDITIONS PRECEDENT—See INSURANCE (7).

CONDONATION—See DIVORCE (4).

CONDUCT OF COUNSEL—See TRIAL (3, 5, 8).

CONSIDERATION—See CANCELLATION OF INSTRUMENTS; DEEDS (1, 2); DURESS (2).

CONSPIRACY—See EVIDENCE (3); HOMICIDE (1, 2); INJUNCTION (3, 8); TRIAL (10).

CONSPIRACY TO DEFRAUD—See FRAUD (3, 4).

CONSTRUCTION—See AMENDMENTS (4).

CONSTRUCTION OF CONTRACT—See INDEMNITY; INSURANCE (3, 5).

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CONSTRUCTION OF DEED—See DEEDS (3).

CONSTRUCTION OF LEASE—See LANDLORD AND TENANT (1).

CONTESTANTS—See APPEAL AND ERROR (1).

CONTINUANCE.

Plaintiff's admission that the witness mentioned in defendant's affidavit would give the testimony stated therein, was not a proper basis for denying the application for continuance under Circuit Court Rule 22. *Gerkin* v. *Brown & Sehler Co.*, 46.

See AMENDMENTS (2).

CONTINUING TRESPASS—See ELECTION OF REMEDIES.

CONTRACTS.

1. Plaintiff, who claimed to have rescinded his purchase of a moving picture theatre for fraud, failed to establish a sufficient tender, upon a record showing that he operated the theatre for a week, closed and locked it and abandoned the property without taking any steps to preserve it, later making a tender of the keys to defendant in another town, having no knowledge where the property was or what had been done with it. *Kimble* v. *Gillard*, 251.

2. In order to make a valid tender rescinding a contract of purchase it is essential to keep the tender good and to be in position at the trial to re-deliver the property. *Id.*

3. Since an agreement between defendant's family physician and a surgeon called in for the purpose of an operation, that the surgeon should divide his fees with the physician, is against public policy and void, in a suit for the expense of the operation, defendant was entitled to wide latitude in cross-examination of plaintiff, and was entitled to show a tacit understanding, as claimed, growing out of previous dealings in similar cases between the two practitioners. *McNair* v. *Parr*, 327.

4. Evidence, in an action for the purchase price of goods, considered and *held*, to present a question for the jury whether plaintiffs ratified the contract for discounts made by their agent and salesman as claimed by defendant. *B. Marx & Son* v. *King*, 662.

See CANCELLATION OF INSTRUMENTS; CORPORATIONS (5); DEEDS (2); EQUITY (1); HIGHWAYS AND STREETS (4); HUSBAND AND WIFE; INDEMNITY; INSURANCE (3, 5, 7); LANDLORD AND TENANT (1, 2); PARTNERSHIP (10); PHYSICIANS AND SURGEONS; PRINCIPAL AND AGENT.

CONTRIBUTORY NEGLIGENCE—See EVIDENCE (10); LOGS AND LOGGING (1); MASTER AND SERVANT (2-4, 17); NEGLIGENCE (4); RAILROADS (1, 3, 5); STREET RAILWAYS (2-4, 7, 8, 12).

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CORPORATIONS.

1. Under the inheritance tax law, a corporation is not liable to the State for the tax upon its stock that was transferred by the will of a decedent who resided in Massachusetts, where the defendant made the transfer on its books without retaining sufficient to pay the tax or notifying the county treasurer; Act No. 188, Pub. Acts 1899, as amended by Act No. 195, Pub. Acts 1903 (1 How. Stat. [2d Ed.] §§ 2022, 2030). It could not be said that the defendant had control over or held the stock within the meaning of the statute, since it enumerates the persons liable to pay the tax, and does not include such corporation; and its stock being absolutely owned by the holder who may dispose of his shares as he sees fit. *People, ex rel. Attorney General,* v. *Quincy Mining Co.*, 458.

2. In an accounting between stockholders of a corporation and its officers and directors, the corporation is a necessary party. *McMillan* v. *Miller*, 511.

3. Equity will not interfere with the management of a corporation unless fraud or misconduct or some of the wrongful acts enumerated by 3 Comp. Laws, §§ 9757-9759 (5 How. Stat. [2d Ed.] § 13530), are set up by the bill. *Id.*

4. Averments of complainant's bill for an accounting that the board of directors voted to defendants as officers of a corporation salaries of $100 a month, although when the complainants bought their stock defendants agreed not to receive any salary for their services, and averments that defendants had executed certain obligations of the corporation to their relatives, do not import fraud, in the absence of any charge of fraudulent intent. *Id.*

5. For breach of the alleged contract, complainants have an adequate remedy at law. *Id.*

6. Stockholders who have participated in the enactment of a by-law which requires them to offer their stock to other stockholders of the corporation and to the corporation before selling the same, and providing for a period of six months in which the offer might be accepted, are estopped from questioning the validity of the by-law. *Weiland* v. *Hogan*, 626.

7. Where the by-laws of a corporation provided that no transfer of stock certificates should be made by any stockholder without first making a written offer of sale of such stock to the corporation and its stockholders, by affidavit, etc., and, if the company refuse to purchase, the stockholders to have six months in which to accept or reject the offer, a decree in injunction proceedings requiring the defendants to sell to complainants all the stock included in a prospective sale or at their election such part as the complainant stockholders offered to take as their *pro rata* share, was just and equitable. *Id.*

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COUNTS—See INTOXICATING LIQUORS (2).

COUNTY ROAD COMMISSIONERS — See HIGHWAYS AND STREETS.

COURT RULES—See CRIMINAL LAW (1).

COVENANTS.

It is incompetent to show by parol, in an action on a vendor's covenant against incumbrances, that the vendee agreed by parol to pay a tax which had become a lien on the property at the time of the conveyance. *In re Johnson's Estate*, 500.

See PARTNERSHIP (11).

CRIMINAL LAW.

1. The requirement that plaintiff's counsel shall make a full and fair statement of his case and of the facts that he expects to prove (Circuit Court Rule 24), is directory only: in a prosecution for murder, the prosecuting attorney did not commit reversible error in omitting to make an opening statement. *People* v. *Koharski*, 194.

2. In marking respondent's requests to charge "refused, except as covered in the general charge," the circuit judge sufficiently complied with the statute which requires the court to mark such requests "given" or "refused," error being assignable on the charge and refusals to instruct without taking specific exceptions under Act No. 52, Pub. Acts 1901 (5 How. Stat. [2d Ed.] § 12960). See 3 Comp. Laws, § 10245 (4 How. Stat. [2d Ed.] § 11839). *People* v. *Smith*, 358.

3. Upon the trial of a prosecution for selling liquor to an habitual drunkard, the court committed reversible error in refusing to counsel for respondent the privilege of stating his theory of the law to the jury in opening his defense. *Id.* 359.

4. Testimony of reputable witnesses, in a larceny case, that they suspected the respondent was a thief, and charged him with having committed a theft, was harmful and erroneously received, though they also testified that he denied the accusation. *People* v. *Hammond*, 416.

5. Testimony relative to such conversation, which respondent stated he did not recollect, was not made competent by his failure to remember, since it is not permissible to impeach a witness by evidence of immaterial facts. *Id.*

6. Refusal of the court to charge that each member of the jury must be convinced of respondent's guilt beyond a reasonable doubt, *held*, not erroneous under instructions that fairly covered the question of reasonable doubt. *Id.*

7. But the court erred in refusing to give a request that respondent's testimony was to be tested like the other witnesses, and if rational, natural, and consistent, might

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CRIMINAL LAW—Continued.

outweigh the testimony of all others; the point not being covered by the charge and no instructions being offered as to the weight or credibility of testimony. *Id.*

See HOMICIDE; INTOXICATING LIQUORS (2, 3); LARCENY.

CROSS-EXAMINATION—See CONTRACTS (3); TRIAL (1, 4, 9, 10); WITNESSES (3).

CROSSING ACCIDENT—See RAILROADS (2, 5).

CUMULATIVE EVIDENCE—See CARRIERS (3).

CUSTOMS AND USAGES.

Testimony of a carpenter and cabinet maker, who did not have general knowledge, of a custom in the community to use a guard on a universal saw, and who gave testimony covering merely his experience, should have been withdrawn by the court from the consideration of the jury, by an instruction that there was no competent evidence of a custom in that vicinity to use guards on such machines, in a personal injury action against his employer. *Welling* v. *Kalamazoo Lumber Co.*, 340.

See EVIDENCE (8, 9); MASTER AND SERVANT (5).

DAMAGES.

1. Plaintiff, who claimed that defendant damaged his car by running into it, was correctly allowed to testify what the value of the use of the car amounted to during the time that he was deprived of it. *Andries* v. *Everitt-Metzger-Flanders Co.*, 110.

2. It was not erroneous to permit the jury to determine what damages plaintiff should receive for future pain and suffering and mental anguish for the loss of an arm and a leg though no evidence other than his physical condition was offered on the subject. *Amanta* v. *Michigan Central R. Co.*, 281.

3. In an action for breach of warranty of a horse which plaintiff returned on discovering its true condition, his measure of damages was rightly held to be the value of such a horse as defendant represented the animal to be, defendant refusing to refund the price. *Patterson* v. *Gore*, 591.

See AMENDMENTS (5); APPEAL AND ERROR (14); ELECTION OF REMEDIES; LOGS AND LOGGING (4, 5); NEGLIGENCE (7).

DAMS—See JUDGMENT; WATERS AND WATERCOURSES.

DANGEROUS MATERIAL—See NEGLIGENCE (3).

DEATH—See CARRIERS (1); MASTER AND SERVANT (19); NEGLIGENCE (5); RAILROADS (5).

DECLARATION—See AMENDMENTS (1, 2, 5).

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DECREE—See CORPORATIONS (7).

DEED AS MORTGAGE—See MORTGAGES (1, 2).

DEEDS.

1. *Held*, that complainant's contention that she was induced to execute a deed of 120 acres of land by fraud and undue influence was not sustained by the proofs; and that the deed was not void for incompetency. *Clark* v. *Gustin*, 63.

2. Evidence considered, and *held*, to show performance by defendant of his agreement for the grantor's support and maintenance during her lifetime, made in consideration of the deed. *Id.*

3. Under a deed granting farm lands to the daughter of the grantors for her life and "at her death to her legal heirs excepting her present husband," containing covenants of seizin, warranty, and against incumbrances, and executed in conjunction with a life lease of the premises from the grantee to the grantors, the said daughter took a life estate with the remainder over to her legal heirs subject to the exception: the instrument was not testamentary in character. *Ultz* v. *Upham*, 351.

See CANCELLATION OF INSTRUMENTS; COVENANTS; FRAUD (5); PARTNERSHIP (11).

DEFAULT—See EQUITY (1).

DEFECTIVE MACHINERY—See MASTER AND SERVANT (5, 7, 8, 10, 19-22).

DEFENSES—See BILLS AND NOTES (5).

DELETERIOUS SUBSTANCES—See NEGLIGENCE (1).

DEMURRER—See DIVORCE (2); EQUITY (2); INJUNCTION (4).

DESCENT AND DISTRIBUTION—See ADOPTION.

DILIGENCE IN PROCURING TESTIMONY—See NEW TRIAL (1).

DIRECTED VERDICT—See APPEAL AND ERROR (17); RAILROADS (3); STREET RAILWAYS (7, 8, 12).

DISCHARGE—See INSURANCE (4).

DISCIPLINE—See INSURANCE (6).

DISCRETION—See APPEAL AND ERROR (9).

DIVORCE.

1. In divorce proceedings it is not required that the husband, being a party complainant, attend at the hearing. Without any request for a continuance or any previous effort to secure the testimony of the husband, the defendant was not entitled to a decree in her favor because of complainant's omission to be present: and although she was

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DIVORCE—Continued.

entitled to compel his attendance as a witness, in the absence of any effort on her part to do so the court properly refused to enter an order requiring complainant to give testimony. *Bauer* v. *Bauer*, 169.

2. In a suit for separate maintenance, the question of laches may be raised by demurrer. *Parkinson* v. *Parkinson*, 336.

3. Mere lapse of time does not constitute laches unless it results in prejudice to the other party: and, therefore, delay of the wife in attempting to enforce her right to separate support, following litigation over a divorce and her failure to move for about ten years, does not of itself bar her suit under 3 Comp. Laws, § 8686 (4 How. Stat. [2d Ed.] § 11534, *et seq.*), where complainant filed a bill for divorce soon after their separation and on her discontinuing the proceedings, defendant filed a second bill and obtained a decree which was reversed on appeal, and where complainant made criminal complaint against her husband for desertion and procured an order that defendant pay her $3 a week; the order having been complied with. *Id.*

4. It is a fair inference, from the fact that complainant waited five years before filing a bill for divorce on the ground of adultery, during which time the wife became insane, that he had condoned the offense so as to bar equitable relief, the question whether defendant was irresponsible when she committed the offense being also in doubt. *Griffin* v. *Griffin*, 623.

See WITNESSES (2).

DRIVING LOGS—See LOGS AND LOGGING (3).

DURESS.

1. Where plaintiff claimed that he executed his promissory note to defendant to avoid threatened prosecution for an alleged shortage which defendant charged had arisen while plaintiff was in its employ, and, on the following day when the note matured, paid the amount promised, and there was no evidence that the pressure had been removed in the meantime, the evidence sufficiently showed duress and its continuance to the time of payment. *Nelson* v. *Leszczynski-Clark Co.*, 517.

2. The discontinuance of an attachment suit that defendant had instituted against plaintiff, but which he knew nothing about at the time he gave the note and of which he only incidentally learned on the day he paid it, was not such consideration as to support the payment or the claimed settlement. *Id.*

3. The court did not commit error in charging the jury that plaintiff could recover only if he proved that he was induced by duress to pay a debt he did not owe, or was misled by fraudulent representations that the amount of

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DURESS—Continued.

indebtedness arising out of the shortage was greater than it really was, and plaintiff paid the amount in reliance on such statements, in which case he could recover the difference between what he paid and what he, in fact, owed. *Id.*

ELECTION OF REMEDIES.

The commencement of an action at law for flooding complainant's lands, where no declaration was filed, did not bar complainant's right to obtain an injunction; for complainant might have pursued his legal remedy to recover such damages as he had sustained up to the time of commencing his action and a judgment would not have barred a subsequent action at law. The remedies at law and in equity were not so inconsistent as to warrant an application of the rule of election. *Feldkamp* v. *Ernst*, 550.

ELECTION OF COUNTS—See INTOXICATING LIQUORS (2).

ELECTIONS—See MUNICIPAL CORPORATIONS.

ELECTRICITY—See EVIDENCE (6, 7); NEGLIGENCE (5, 6).

EQUITY.

1. Defendant sold, under a contract reserving title to the property, a quantity of machinery to a motor car manufacturing company which later became insolvent. Before proceedings in bankruptcy were begun, defendant possessed itself of the machinery upon the default of the purchaser in making the stipulated payments. A resale of the property brought more than the unpaid balance, and the trustee in bankruptcy filed a bill for an accounting, claiming a substantial equity in the funds obtained at the resale, asking the court to construe the contracts and charging that possession was taken by force and without the consent of the insolvent. *Held*, that the averments of the bill charging a forcible seizure, etc., were not sustained by the evidence, that complainant had an adequate remedy at law and no trust existed in the proceeds obtained from the sale. *Detroit Trust Co.* v. *Wormer Machinery Co.*, 156.

2. On demurrer to a bill filed by a number of taxpayers, averring that their interest in the subject matter exceeded $100, and seeking to restrain performance of a number of contracts for machinery to be used in county road improvements, the point that the bill fails to show jurisdiction as to amount or value was properly overruled: if it should appear upon the taking of proofs that the complainants have no such interest as to satisfy the requirements of the statute, the objection may be tenable. *Brandt* v. *Luce*, 184.

3. While equity has no jurisdiction to restrain the commis-

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EQUITY—Continued.

sion of a crime, a bill in the nature of an information, filed by the prosecuting attorney on relation of certain taxpayers, to restrain an alien from engaging in the business of selling intoxicating liquors at retail is within the equitable jurisdiction of the court: licenses, etc., procured by fraud from State officials or boards are subject to cancellation in equity. *Andrews* v. *Auer*, 245.

See APPEAL AND ERROR (3, 8); BANKRUPTCY; CORPORATIONS (2, 3, 5); DIVORCE (2, 4); FRAUD (7); INJUNCTION (2); JUDGMENT; MUNICIPAL CORPORATIONS (1).

EQUITY PRACTICE—See INJUNCTION (5, 7).

ESTATES OF DECEDENTS—See CORPORATIONS (1); EXECUTORS AND ADMINISTRATORS; WITNESSES (1, 5).

ESTOPPEL—See CORPORATIONS (6); ELECTION OF REMEDIES; INSURANCE (10, 11); JUDGMENT (1); LANDLORD AND TENANT (1); PARTNERSHIP (1, 2, 7).

EVIDENCE.

1. There was no reversible error for admitting evidence of admissions made by the officer of a corporation when he testified, as a witness, to the facts claimed to have been admitted on the trial of an action for damages to plaintiff's automobile. *Andries* v. *Everitt-Metzger-Flanders Co.*, 110.

2. The court rightly excluded from the evidence any cross-examination of plaintiff relating to disclosures made by plaintiff to defendant's attorney on an occasion when plaintiff visited the attorney for advice in a professional capacity before commencing suit, although the lawyer refused to accept the case. *Devich* v. *Dick*, 173.

3. Declarations of a co-conspirator are competent as to a party to the conspiracy, but are not admissible until the conspiracy has been shown by other testimony. *Kimble* v. *Gillard*, 251.

4. Alleged admissions made during negotiations for compromise are privileged and should be excluded. *Id.*

5. Evidence tending to show that an engine was seen near the place of injury shortly after the accident, running backwards without lights, was not incompetent, where the court instructed the jury not to consider the evidence unless they found that the engine was the one which injured plaintiff. *Amanta* v. *Michigan Central R. Co.*, 281.

6. Evidence tending to show that a witness cut off one end of the broken wire and took it to the office of the electric light company, that another witness was there, saw it, and the exhibit looked like the end of the piece, as he testified, that another witness cut off the small piece offered in evidence, and had been informed that the wire was the broken wire in question, warranted the court in

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EVIDENCE—Continued.

receiving the exhibit as evidence. *Sykes* v. *Village of Portland*, 291.

7. It was not error to receive in evidence a piece of wire that ran parallel to the broken section, showing similar defects to those claimed to have existed in the insulation of the fallen section of wire. *Id.*

8. On the trial of a personal injury action, wherein plaintiff claimed that defendant neglected to guard or protect one of his pulleys, used in moving a building, and that a child of two years caught his hand in it as a result of defendant's negligence, testimony that defendant employed the usual appliances of persons moving buildings, was not incompetent or inadmissible in evidence. *Slack* v. *Curry*, 437.

9. The custom of defendant's employees in protecting children was not a proper subject of testimony: the error committed in receiving such evidence was not, however, prejudicial, where the witnesses testified in detail what they did on the day of the accident to protect children. *Id.*

10. And any error that the court may have committed in receiving testimony that the infant was in the charge of a ten-year old boy, who said he lived with the family to care for the children, was cured by the charge of the court that plaintiff was not chargeable with contributory negligence on account of his extreme youth, and that the negligence of his parents could not be imputed to him. *Id.* 438.

11. Evidence that defendant's superintendent stated before the coroner's jury at an inquest that defendant had intended to replace the pulley which burst and killed plaintiff's intestate, but thought they would let it run awhile, was not admissible as substantive proof of his knowledge that the machinery was defective. *Clark* v. *Goldie*, 653.

See APPEAL AND ERROR (7, 14, 17); ARREST (1); BILLS AND NOTES (1, 7); CONTRACTS (4); COVENANTS; CRIMINAL LAW (4); CUSTOMS AND USAGES; DAMAGES (1, 2); DEEDS (1); DIVORCE (1); DURESS (1); EXECUTORS AND ADMINISTRATORS (2); FRAUD (1, 3, 4); FRAUDS, STATUTE OF; INTOXICATING LIQUORS (1); LARCENY; MASTER AND SERVANT (5, 12, 22); MORTGAGES (2); NEGLIGENCE (7); PARTNERSHIP (1, 4-6, 9, 12, 13); SALES (1); TRIAL (4, 9, 11); WILLS (3, 4, 7); WITNESSES.

EVIDENCE OF NEGLIGENCE—See MASTER AND SERVANT (8).

EXCEPTIONS—See TRIAL (7).

EXCEPTIONS TO CHARGE—See APPEAL AND ERROR (6).

EXCHANGE OF PROPERTY—See FRAUD (7).

EXECUTION OF NOTE—See BILLS AND NOTES (5).

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EXECUTORS AND ADMINISTRATORS.

1. While it is presumed that a sale of real estate by an administrator to a third person who thereafter conveys to the administrator, is void, the presumption is not conclusive; evidence showing good faith or sufficient consideration may be enough to rebut the presumption. 3 Comp. Laws, § 9095 (4 How. Stat. [2d Ed.] § 11248). *Ketchum* v. *Ketchum*, 100.

2. Where the administratrix of an estate sold real property of the estate to pay debts, for a consideration of $900, taking a deed from the purchaser to herself on the same day, for the same consideration, and it appeared that the value of the property was $900, that it had been appraised at $950 and before it was sold a second appraisal was made at $900, the sale was voidable only, and the evidence tending to show good faith and sufficient consideration, uncontroverted, sustained the validity of the transfer. *Id.*

3. *Held*, also, that the evidence was insufficient to establish either actual fraud or the claim that the administratrix was interested in the sale to such an extent as to invalidate it. *Id.*

EXEMPTION FROM PROCESS—See MANDAMUS.

EXPERT TESTIMONY—See APPEAL AND ERROR (14); MASTER AND SERVANT (4).

EXPLOSIVES.

1. Under Act No. 37, Pub. Acts 1909 (2 How. Stat. [2d Ed.] § 2598 *et seq.*), requiring gasoline, benzine, etc., to be kept in receptacles painted red and lettered with the name of the contents, the common law affords a remedy to an individual injured by violation thereof, although the law imposes only a penalty and creates no new remedy; where a duty is imposed by statute for the protection of individuals, the common law usually supplies a remedy if the statute gives none. *Molin* v. *Wisconsin Land & Lumber Co.*, 524.

2. But where defendant permitted servants of a lumbering contractor to use its shop to warm their food and eat lunch, and to build a fire for such purpose, it was not liable because one of them poured gasoline from a can which was not painted or lettered as required by the statute, in order to start a fire, causing an explosion in which plaintiff was injured, in the absence of any averment that it was customary to use oil or kerosene in building fires, whereby defendant should have anticipated that they would search for and use its oil, and where plaintiff was a mere licensee on the premises and was not invited or permitted to use the oil. *Id.*

3. Reasonable precaution did not demand that defendant should cover a blast occurring 500 feet from any house,

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EXPLOSIVES—Continued.

if sufficient warning was given to any persons in the immediate vicinity. *Moronen* v. *McDonnell*, 692.

See MASTER AND SERVANT (22-28).

FELLOW-SERVANTS—See MASTER AND SERVANT (18-20, 27).

FIDELITY CONTRACT—See INDEMNITY; INSURANCE (8).

FINDINGS OF FACT—See APPEAL AND ERROR (13).

FIRE INSURANCE—See INSURANCE (1, 9-11); LIMITATION OF ACTIONS.

FLOODING LANDS—See LOGS AND LOGGING (1).

FORECLOSURE—See BANKRUPTCY (2); MORTGAGES (3).

FORFEITURE—See EQUITY (1).

FRATERNAL INSURANCE—See WITNESSES (5).

FRAUD.

1. In an action for fraud and deceit, plaintiff's admission, under oath, that the inducement which led him to make the contract in question was the fact that another person invested his money in the deal at the same time, and nothing else led him to consummate the purchase, constituted a fatal variance from the declaration, which set up the fact that plaintiff believed and relied on the representations of defendant. *Kimble* v. *Gillard*, 250.

2. Fraudulent representations are only actionable if plaintiff relied on them: all material allegations of the declaration must be proved substantially as alleged. *Id.*

3. Statements made by one of two joint defendants, not in the other's presence, are inadmissible to show fraud as to the absent party, unless there is evidence of a conspiracy to defraud. Evidence considered, and *held*, insufficient to establish a conspiracy. *Id.*

4. And where the cause was tried against one of two joint defendants who had been served and had appeared, the other defendant, who had not joined issue and filed a plea in abatement that was undetermined at the time of trial, could not bind the codefendant by his admissions or statements. *Id.* 251.

5. Evidence *held*, to be insufficient to sustain the burden of proof resting on complainant, who claimed that her son and his attorney had procured the execution of a deed of her property by fraud. *Appenzeller* v. *Appenzeller*, 303.

6. The general rule that statements as to the value of property are mere matters of opinion and will not give rise to an action for fraud, is subject to the exception that false statements of the value of property intentionally made to one who is in ignorance of the quality and value,

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FRAUD—Continued.

under such circumstances as indicate a purpose to induce the party to rely upon them, he having no opportunity to examine the subject-matter, may be treated as fraudulent. *Face* v. *Hall*, 495.

7. Concealment of the fact that a grocery business had been unprofitable, in connection with false statements relative to the value of the stock of groceries and merchandise exchanged for other property, and with the false representation that the venture had been profitable up to a stated time, made by the seller, entitled the buyer to bring a suit in equity for cancellation based on the fraud, although he had full opportunity to inspect the stock which he purchased. *Id.*

8. The rule that a seller has the right to praise his property and to give his opinion concerning its value cannot be extended to warrant false representations as to value and selling qualities, which may be relied on by the purchaser and operate as an inducement to the deal. *Pratt* v. *Allegan Circuit Judge*, 558.

9. The representation that property will readily sell in the market at a stated price is a representation of fact, and, if relied upon, may be treated as the basis of an action for fraud: an affidavit for capias charging such misrepresentation is not defective on the ground that it sets up statements that constituted mere "seller's talk." *Id.*

See ARREST (1, 2); BILLS AND NOTES (2); CONTRACTS (1, 3); CORPORATIONS (4); DAMAGES (3); DEEDS (1); EQUITY (3); EXECUTORS AND ADMINISTRATORS; INTOXICATING LIQUORS (1); PRINCIPAL AND SURETY.

FRAUDS, STATUTE OF.

A receipt for money paid on the purchase price of land is insufficient as evidence of an executory agreement to sell the land, when it fails to state the times of payment of the unpaid balance. *Nichols* v. *Burcham*, 601.

GASOLINE—See EXPLOSIVES (1, 2).

GOOD FAITH—See BILLS AND NOTES (1); TRIAL (10, 11).

GOVERNMENTAL FUNCTIONS—See NEGLIGENCE (6).

GUARANTY—See MORTGAGES (3).

GUARDS—See MASTER AND SERVANT (5).

HEARSAY—See PARTNERSHIP (5, 8).

"HEIRS"—See ADOPTION; APPEAL AND ERROR (1); DEEDS (3); WITNESSES (1).

HIGHWAYS AND STREETS.

1. The board of county road commissioners, under Act No.

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HIGHWAYS AND STREETS—Continued.

283, Pub. Acts 1909 (2 How. Stat. [2d Ed.] § 2173 *et seq.*), are required to file in the office of the county clerk the reasons for not letting highway construction by contract and for proceeding by day labor, before they may construct the highways, and an estimate is required specifying and itemizing the roads and parts of roads on which money is to be expended: no express power is conferred to enter upon the business of road building. *Brandt* v. *Luce*, 184.

2. And under section 10 of the act the board may employ superintendents, engineers and others and buy proper machinery, tools and materials for the purpose of carrying out their work, and this power may be exercised wholly or partly when contracts for road building are let, or when bids have been rejected and work entered upon by day labor. *Id.*

3. Where complainant's bill of complaint did not show that the preliminary steps required by the statute had been omitted by the board, and machinery had been purchased under contract, but it was charged that the county road commissioners could not lawfully contract for machinery of more than the value of $500 without advertising for bids, and that they had attempted to do so, the averments of the bill did not state any ground for relief: the power to purchase machinery was not limited by the clause set up by the pleader, and the general authority or duty to keep the highways in reasonable repair supported the exercise of authority by the commissioners. *Id.*

4. After the supervisors had provided for tax of $40,000, the board of road commissioners did not exceed its authority in contracting for $22,000 worth of machinery to be paid for at stated intervals during three years, without interest, under section 21, prohibiting the board from contracting any indebtedness in excess of moneys on hand or of three-quarters of the taxes voted. Appropriations made by the commissioners are to be treated as appropriated from such funds as the board had a right to appropriate and the contracts for machinery are therefore valid. *Id.* 185.

See EQUITY (2); STREET RAILWAYS (1, 3, 5, 10).

HOLDER IN DUE COURSE—See BILLS AND NOTES (6).

HOLDING OUT—See PARTNERSHIP (1, 2, 7, 8).

HOMICIDE.

1. While it is a general rule that the several conspirators engaged in the commission of a felony are chargeable with a murder which one of them commits in the process of carrying out the purposed offense, even though homicide was not planned, the same rule does not apply to

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HOMICIDE—Continued.

conspirators engaged in a misdemeanor which results in unpremeditated homicide. *People* v. *Koharski*, 194.

2. The trial court, in a murder case, committed error in charging the jury that "where several persons are concerned in the commission of a felony or of any unlawful act," and in the execution of a common purpose any one of them commits a murder, all who were present aiding or abetting in the unlawful purpose were guilty of the murder, the testimony having tendency to prove that the offense which the accused conspired to commit was simple assault,—a misdemeanor. *Id.*

See CRIMINAL LAW (1).

HUMILIATION—See DAMAGES (2).

HUSBAND AND WIFE.

Where plaintiff claimed that defendant employed him and his wife at $60 a month, including $10 per month for the services of the wife in running a boarding house, the court did not err in submitting to the jury the question whether the contract was divisible or joint, and in charging that if the contract was joint and the head bartender employed both to work for himself, plaintiff could not recover; if the former had no authority to hire plaintiff as bartender, the verdict must be for defendant; if he engaged plaintiff for $50 a month as bartender and the jury found he had authority to engage a bartender, plaintiff could recover on the contract of employment. *Devich* v. *Dick*, 174.

See DIVORCE; SALES (2); WITNESSES (2).

IDENTIFICATION—See EVIDENCE (6);

IDENTITY—See LARCENY.

IMPEACHMENT—See CRIMINAL LAW (5); WITNESSES (4).

IMPUTED NEGLIGENCE—See EVIDENCE (10); STREET RAILWAYS (6).

INCOMPETENCY OF EMPLOYEE—See MASTER AND SERVANT (20).

INCONSISTENT CLAIMS—See ELECTION OF REMEDIES.

INCONSISTENT POSITIONS—See MORTGAGES (3).

INDEMNITY.

1. Where plaintiff as surety executed a bond to secure the performance of a building contract, and the principal in the bond defaulted, the plaintiff, which paid the liability in good faith, was entitled to maintain an action against a third party who had agreed to indemnify the plaintiff corporation against any loss, although it had not availed itself as a defense of a clause in the bond requiring suit

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INDEMNITY—Continued.

to be brought within six months after default, defendant's agreement containing a clause that the surety company should be reimbursed for any and all sums paid by it in good faith under the belief that it was liable or that the expenditure was necessary or expedient. *Fidelity & Deposit Co. of Maryland* v. *Hibbler*, 490.

2. A contract of indemnity is to be interpreted so as to cover any loss or liability which the parties reasonably appear to have intended it to include, but not such as are expressly excluded or of such a character that it can reasonably be inferred that they were not intended to be within the agreement. *Id.*

See INSURANCE (2, 4, 7).

INDICTMENT AND INFORMATION — See INTOXICATING LIQUORS (2, 3).

INFANTS—See EVIDENCE (8-10).

INHERITANCE TAX—See CORPORATIONS (1).

INJUNCTION.

1. Before applying for the writ of mandamus to require the circuit court to reinstate an injunction against unlawful acts, dissolved upon motion of defendant members of a miners' union, who were engaged in a strike, it was proper practice to apply to the court by motion and by affidavits in support thereof, showing concerted acts of violence and intimidation and praying for a restraining order against the same, where, on dissolution of the interlocutory injunction, the court had expressly reserved the right to issue a restraining order with or without notice. *Baltic Mining Co.* v. *Houghton Circuit Judge*, 632.

2. Upon the refusal of the circuit court to issue a restraining order as prayed, based on the alleged ground that it had no power to do so because the bill was deficient, and exercising no discretion upon the showing made, the question for the Supreme Court in mandamus proceedings was one of law. *Id.*

3. The bill for an injunction against strikers to restrain existing and threatened violence, intimidation and conspiracy, supported and accompanied by affidavits, must be taken as true on a motion to dissolve, in the absence of answers or affidavits denying the averred facts. *Id.*

4. An injunction bill filed by the owners of several copper mines against the Western Federation of Miners, averring that defendants inaugurated a general strike of its members during the preceding summer, that upward of 4,000 employees of the defendants had refused to participate in the strike and tried to continue their employment but defendants had interfered with them, by force, threats and intimidation, causing them to stop work at the pumps,

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INJUNCTION—Continued.

the mines to partly fill up with water and forcing suspension of work, further setting up the existence of lawlessness, violence, and conspiracy, accompanied by acts of intimidation, and further threatened violent unlawful acts, set forth in detail, and the sending of State troops to restore order, and failure to effect that result, was not demurrable and sustained a preliminary injunction issued upon the showing. *Id.* 633.

5. There was also no ground for the objection that the bill was not properly verified, where seven affiants swore to the facts of their own knowledge "except as to matters therein stated upon information and belief" and the material, essential averments were stated positively. *Id.*

6. General certainty is all that is required in a bill of complaint; it is not necessary to relate all the details. *Id.*

7. In order to justify the issuance of a preliminary injunction, the court need not find that the complainant's rights have been clearly established, or that complainant is entitled to prevail at the hearing; if a substantial question exists, cognizable in equity, and in order to prevent irremediable injury to the complainant it appears to be necessary to prohibit any change in the conditions and relations of the subject-matter or parties, an injunction is warranted. *Id.*

8. Courts of equity have authority to restrain conspiring labor organizations from molesting by violence, threats and intimidation those engaged in any lawful employment and those who employ them. *Id.*

9. Peaceable meetings or parades permitted under an injunction restraining violence and threats do not include parades near the premises of the working miners so timed as to impede or intimidate them in going to or returning from work, or loitering near the premises of the mines or homes of the laborers, intended to intimidate the men. *Id.* 634.

See BILLS AND NOTES (1); ELECTION OF REMEDIES (1); EQUITY (2, 3); INTOXICATING LIQUORS (1); JUDGMENT; MORTGAGES (3); WATERS AND WATERCOURSES (1).

INSANE PERSONS—See DIVORCE (4).

INSPECTION—See MASTER AND SERVANT (15, 18).

INSTRUCTIONS—See APPEAL AND ERROR (4, 6, 7, 12); CRIMINAL LAW (6, 7); CUSTOMS AND USAGES; DURESS (2); EVIDENCE (5, 10); HOMICIDE (2); MASTER AND SERVANT (4, 9-11, 14-16); NEGLIGENCE (4, 7); PARTNERSHIP (6, 7); RAILROADS (4); SALES (2); STREET RAILWAYS (4, 5); TRIAL (2).

INSURANCE.

1. Where the plaintiff, with the consent of defendant insurance company, sold the property insured under a land

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INSURANCE—Continued.

contract which provided that the purchaser should keep the premises insured for the benefit of the seller, and in case of loss the insurance should apply on the unpaid balance due, and where the vendee obtained further insurance of another corporation on the equity in the property, an action lay in favor of the vendor against the first insurer for the full amount of the policy which was less than the balance due under the land contract. Since the vendee obtained the second policy without the vendor's consent, the rights of the latter were not affected, and he was not entitled to any benefit under that policy of insurance. *Smith* v. *American Insurance Co.*, 123.

2. Under a policy of indemnity against loss of employment occasioned by discharge of the insured or his suspension as a penalty or method of discipline, containing a condition that knowingly disobeying orders or rules should not be included among the insurable causes of discharge, and that the insured must show by his notice of claim and accompanying proofs that his suspension or discharge was strictly within the terms of the certificate or policy, and that the cause assigned by the employer should be the sole basis of determining liability, such assigned cause must be taken as a basis or general reason for the discharge, and could not be contradicted, but it would be an unreasonable construction to hold that plaintiff could not recover unless his employer stated as cause of his discharge all the stipulated conditions or provisions essential to liability. *Stitt* v. *Locomotive Engineers' Mutual Protective Ass'n*, 207.

3. Both application and policy must be construed together as constituting the contract, and plaintiff is presumed to have read and understood both. *Id.*

4. And under its conditions plaintiff could only recover if his discharge or suspension was in the nature of a penalty, the word discharge presumptively meaning that the employer no longer needs or desires the servant's services and terminates the contract relation. *Id.*

5. Penalty indicates punishment for doing or failing to do a required act. *Id.*

6. But the word discipline as employed in the contract signified instruction, or the communication of knowledge and training to observe and act in accordance with rules or orders and was used in the sense of correction, chastisement, or punishment inflicted by way of training. *Id.*

7. Where plaintiff's notice of claim given to the insurer did not indicate that his suspension or discharge was a penalty or measure of discipline, and not for knowingly disobeying orders or rules, and the policy required specifically that his statement must show that he was within the provisions of the certificate, he could not re-

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INSURANCE—Continued.

cover, and a verdict was properly directed for defendant. *Id.* 208.

8. Plaintiff, a fidelity insurance company, furnished to the employer of one Maile a bond of indemnity against loss by reason of the default of its employee. As security, defendants gave a bond to plaintiff to save it harmless against damage or loss on the fidelity obligation, in which it was provided that the contract should be void as to claims that might arise subsequent to any default, if the employer should fail to notify plaintiff, the obligor, immediately, or as soon as practicable, thereafter. Maile rendered a monthly account in which a deficiency of $27.26 appeared. He was notified of the irregularity and advised to correct it in his next report, which, however, showed an additional shortage, and plaintiff was required to reimburse the employer. In a suit on the collateral contract defendants contended that their obligation was no more extensive than that of plaintiff and that it had been released by the employer's failure to report the first shortage. *Held*, that the requirement of the fidelity bond as to notice of default did not necessitate a report of an apparent error or honest mistake, and defendants were liable on their undertaking. *Fidelity & Deposit Co. of Maryland* v. *Maile*, 231.

9. An action upon a Michigan standard policy of fire insurance must be brought within a year from the date of the fire. Act No. 277, Pub. Acts 1905 (3 How. Stat. [2d Ed.] § 8328). *Dahrooge* v. *Rochester German Ins. Co.*, 442.

10. And the period is not extended by mere assurances that the loss would be paid, offered by defendant's adjuster during negotiations of settlement. Waiver must arise by express agreement, from a new promise to pay or out of part payment or failure to plead. *Id.*

11. Where plaintiff, acting under legal advice, entered into negotiations with defendant's adjuster, and was put off from time to time with assurances that the parties would get together, or that defendant would pay the loss, or not to sue, that the adjuster was busy and would take up the matter later, so that the insured delayed starting legal proceedings until two or three months before the expiration of the year, and where two actions failed or were abated, and service was not secured until four months in excess of the year had elapsed, defendant was not liable on any theory of estoppel or waiver. *Id.*

See INDEMNITY; LIMITATION OF ACTIONS (1); WITNESSES (5).

INTENT—See CORPORATIONS (4); HOMICIDE (1); MORTGAGES (2).

INTERLOCUTORY DECREES—See APPEAL AND ERROR (2).

INTIMIDATION—See INJUNCTION (9).

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INTOXICATING LIQUORS.

1. On testimony showing that defendant had admitted he was not a citizen of this country, that he had applied for second naturalization papers, but had been unable to secure them in time to aid his application for license as retail liquor dealer, and that he had made application therefor under oath, stating that he was a citizen of the United States, it is found, on appeal, that he was not naturalized and had committed fraud in his application. *Andrews* v. *Auer*, 244.

2. The trial court, in a prosecution on an information embracing two counts, the first for selling intoxicating liquor to an habitual drunkard, and the second for selling to a posted person, was not in error in denying a motion to quash the information because the justice of the peace before whom respondent was examined refused to specify in his return on which count he bound over the accused, who, at the trial, asked for and obtained an election on which count the prosecutor proposed to proceed. *People* v. *Smith*, 358.

3. It was sufficient to charge the offense in the language of the statute creating the offense. 2 Comp. Laws, § 5391 (2 How. Stat. [2d Ed.] § 5067). *Id.*

See CRIMINAL LAW (3); EQUITY (3).

JOINT LIABILITY—See SET-OFF AND RECOUPMENT.

JOINT PARTIES—See FRAUD (3, 4); HUSBAND AND WIFE.

JOINT PURCHASE—See SALES (2).

JUDGMENT.

The fact that complainant, who asked for an injunction to compel the removal of a dam, had been a witness for another injured party in an action at law for damages, did not preclude his right to equitable relief, although, by stipulation, prospective damages had been recovered by the plaintiff in the cause, wherein complainant was not, however, made a party. Nor did the fact that complainant had agreed that if the case were lost, he would pay part of the expense, prevent him from seeking the right to an injunction. *Feldkamp* v. *Ernst*, 550.

See APPEAL AND ERROR (2).

JURISDICTION—See EQUITY (3).

As Dependent upon Amount in Controversy—See EQUITY (2).

JURY—See WILLS (6).

JUSTICES OF THE PEACE—See AMENDMENTS (3-5); BILLS AND NOTES (5); INTOXICATING LIQUORS (2).

LABOR UNIONS—See INJUNCTION (1, 3, 4, 8).

LACHES—See DIVORCE (2, 3).

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LANDLORD AND TENANT.

1. Where landlord and tenant mutually agreed upon an extension of an existing lease, and it was stipulated by an addition to the instrument that in case the lessor's tax assessment was increased at a date specified, the rent should be increased by three per cent. of the additional valuation, and it appeared that the lessor, being subjected to an increase in the assessed valuation, wrote to the tenant stating the amount to be paid in addition to the previous rental, and where he had received the same over a considerable interval, the landlord and his grantee were estopped to set up a mistake in the sum claimed which had been discovered by the lessor soon after sending the communication to the lessee without having made any objection or notification to the latter: the grantee of such landlord was not entitled to cancel the lease because he claimed the premises were being occupied for a different purpose than that authorized by the contract, his grantor having accepted rentals for a long period of time with knowledge of the use to which the premises were being put. *Poli* v. *Jacobs*, 238.

2. And under the agreement that May 1st be fixed as the date when the rent should increase if a change in assessment occurred, the valuation for that year, not taking effect until May 5th, could not be considered in fixing the rental. *Id.*

See AMENDMENTS (3).

LARCENY.

If, from the opportunity of a witness to identify respondent, who was charged with the larceny of an automobile, her opinion was of value, it could properly be received: having seen respondent and had a good opportunity to judge of his appearance, the witness might be permitted to testify that the accused looked like the same person who had the automobile. *People* v. *Hammond*, 416.

See CRIMINAL LAW (4).

LEADING QUESTIONS—See TRIAL (6).

LEASE—See AMENDMENTS (3); LANDLORD AND TENANT (1).

LICENSE—See EQUITY (3); INTOXICATING LIQUORS (1).

LICENSEES—See EXPLOSIVES (2).

LIENS—See APPEAL AND ERROR (11).

LIFE ESTATES—See CANCELLATION OF INSTRUMENTS; DEEDS (3).

LIFE INSURANCE—See WITNESSES (5).

LIGHTS—See RAILROADS (4).

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LIMITATION OF ACTIONS.

3 Comp. Laws, § 9738 (5 How. Stat. [2d Ed.] § 14145), extending the time for commencement of suit one year after failure, abatement, or dismissal of any action instituted within the period of limitations, has no application to a fire insurance policy of standard statutory form. *Dahrooge* v. *Rochester German Ins. Co.*, 443.

See INSURANCE (9, 11).

LOGS AND LOGGING.

1. In an action brought by plaintiff for causing his lands to be flooded by a jam formed by defendant's logs that obstructed the river, plaintiff was not chargeable with contributory negligence for permitting a birch tree to remain in a leaning position over the stream so as to obstruct defendant's drive. *Bellaire* v. *Worcester Lumber Co.*, 222.

2. That defendant suffered a jam to form of logs which its employees were driving down a stream, filling the banks for a considerable distance up the stream past plaintiff's property, that none of defendant's men were within five miles when the conditions arose, and from one and a half to two and a half days elapsed before the men arrived to break the jam which caused plaintiff's land to be flooded and washed out, furnished evidence of negligence. *Id.*

3. No liability would arise from a jam produced by natural causes, unless, by the exercise of due care, the formation of the jam could have been avoided, but the law requires persons so engaged in driving logs to use due diligence and to employ such number of men and means as will accomplish the object of breaking any jam that may form, without undue delay. *Id.*

4. But a judgment for $1,057 was excessive, on testimony tending to show that the total value of the land damaged was $275, that the cost of diking the river amounted to $550 and other damages did not exceed $20 in all. *Id.*

5. The measure of damages would be the diminution in value of plaintiff's farm through the effects of defendant's negligence. *Id.*

LOST WILLS—See WILLS (1).

MACHINERY—See EVIDENCE (8).

MANDAMUS.

Mandamus is the proper remedy to review an order quashing service of a declaration on the ground that the defendant was exempt from service of process, since the ruling was not a final order reviewable on error; proper service being yet open to plaintiff. *Coatsworth* v. *Wayne Circuit Judge*, 565.

See INJUNCTION (1, 2); MUNICIPAL CORPORATIONS (1).

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MARRIAGE—See TRIAL (4).

MASTER AND SERVANT.

1. Testimony that defendant failed to supply customary safeguards for the gearing of its rattlers and to furnish loose pulleys to throw the power off, and that the safeguards could easily and inexpensively have been provided, making it unnecessary for an employee to climb on a barrel to put on a heavy belt by hand, tended to establish negligence, under Act No. 285, Pub. Acts 1909 (2 How. Stat. [2d Ed.] § 4025). *Glassbrook* v. *Lansing Wheelbarrow Co.*, 29.

2. Taking the facts as presented by plaintiff's witnesses as true, where plaintiff testified that he did not know of any rule against putting belts on running pulleys, and had been instructed how to put the belts on the rattlers when the machinery was in operation, and had so done for several months, that having become familiar with the danger, he purposed to quit unless the difficulty was obviated, and complained to his foreman who advised him to go ahead, be careful, and use all precautions, and the defects would soon be corrected, he was justified in putting on the belt as he had been instructed to do, and was not chargeable with contributory negligence as matter of law, nor did the directions amount to a change or revocation of his previous instructions. *Id.*

3. Whether the danger was so imminent that no prudent person would undertake to perform the service, was a question of fact: knowledge of the danger was not conclusive evidence of want of care on plaintiff's part. *Id.* 30.

4. Argument of plaintiff's counsel to the effect that a working man was entitled to wear mittens while he was putting on the belt, if counsel for defendant and himself could wear fur wraps and gloves on the street,—being outside the record,—with other remarks tending to enhance the damages and improperly criticising expert testimony introduced by defendant, was prejudicial and erroneous, where the verdict rendered was large in amount, over $6,500, and where the court in his charge instructed the jury to decide the matter "as it actually affects you." *Id.*

5. Where plaintiff claimed that the superintendent of defendant had promised him to repair a defective sticker machine near his place of work, and that the defendant failed to make the promised repairs to the machine, which threw a splinter into plaintiff's eye, and it was apparent that plaintiff knew of the dangerous condition, evidence that other manufacturers provide hoods for sticking machines of that kind to protect the side heads, was not material, plaintiff failing for other reasons to establish liability. *Gorrey* v. *W. F. Hurd Co.*, 116.

6. *Held*, that the testimony showed plaintiff knew the exact situation and might have protected himself from injury,

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MASTER AND SERVANT—Continued.

but that he did not regard the alleged defect as dangerous to him. *Id.*

7. Whether defendant's servant, who was injured in oiling or adjusting a fan operated by a defective belt which caught his hand or wrist and forced it into the fan, knew of the defect alleged or not, was, under conflicting testimony, properly left to the jury to determine. *Cummins* v. *Boyne City Tanning Co.*, 217.

8. Plaintiff's testimony that defendant was using a canvas belt temporarily to operate the fan, and that the edge of the belt, being frayed, struck his hand so as to force it into the revolving fan, supported the verdict rendered in his favor. *Id.*

9. Where plaintiff had used the saw at which he was injured on occasions previous to his injury, and knew how to operate it, the court erroneously instructed the jury that there was no contract of hire to do the machine work; plaintiff assumed such risks as were or ought to have been obvious to him, in the exercise of reasonable care. *Welling* v. *Kalamazoo Lumber Co.*, 340.

10. Where defendant claimed and offered evidence tending to prove that its superior servant had told the plaintiff to lower the saw, and that plaintiff had failed to comply with the instructions, defendant was entitled to have its request given, that if plaintiff was hurt because he did not lower the saw, and the other facts were found as claimed by the defense, he could not recover. *Id.* 341.

11. Upon testimony having a tendency to show that an accumulation of sawdust under the machine might have caused plaintiff's injury, the court did not err in refusing to instruct the jury that plaintiff could not recover on that claim, since it appeared that he was not the regular operator of the saw. *Id.*

12. A verdict for injuries sustained by plaintiff, who claimed he was hurt while in the employ of defendant corporation, is affirmed on his testimony tending to show that he was employed by defendant's president and another agent, and that defendant admitted the existence of the relation in a certain letter or exhibit, though defendant offered proofs to show that he was in the service of an independent contractor. The evidence presented a question of fact for the jury. *Druck* v. *Antrim Lime Co.*, 364.

13. Where plaintiff's counsel, in his argument to the jury, said that if they thought plaintiff was entitled to recover, he believed they would take the burden of his support off the taxpayers of the county and place it upon defendant, where it belonged, and no ruling on the objectionable language was secured from the court, whose attention was not directed to it, a new trial was correctly denied on motion of defendant alleging the improper conduct of counsel. *Id.* 365.

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MASTER AND SERVANT—Continued.

14. Nor was it erroneous to instruct the jury that if, as plaintiff claimed, he was engaged by the president of defendant company, who was also general manager, and received his pay from the corporation, and, so long as he worked there, he had no notice or information that his employment had terminated or changed to that of and under an independent contractor, the relation of employee and employer continued to exist. *Id.*

15. In charging the jury relative to the duty of plaintiff's employer to inspect the face of the cliff which the men were engaged in blasting, the court correctly instructed them that it was the custom after a blast was fired to examine the face of the cliff and warn any of the workmen who might undertake to work at or near the place of the blast or within dangerous proximity thereto, before defendant had inspected it, and that under the undisputed evidence the plaintiff had received no warning on the occasion of the accident and the charge was not misleading or open to the objection that it left the jurors to infer that a custom had prevailed to inspect the entire face of the cliff, instead of the portion likely to be affected by the blast. *Id.*

16. On the trial of an action for injuries sustained by a miner in defendant's employ, the court did not err in stating to the jury the claim of plaintiff in detail, in part as follows: That plaintiff claimed he was working in a stope with a partner; that the mine was working a day and night shift; that the plaintiff and another employee were running a drilling machine, and the rock was being excavated from between other strata of stone, which were known as the hanging wall and foot wall; that it was not part of plaintiff's duty to put in timbers and if they considered such work necessary to support the wall the men applied to the shift boss who was the proper person to cause the timbers to be put in by workmen employed for that purpose; that plaintiff called the attention of the shift boss to a point that looked dangerous and told the boss that plaintiff thought it ought to be timbered; that the place, in fact, needed support, and the boss who examined it told plaintiff he would send men to do it either that afternoon or the next day and directed plaintiff not to bar down any more rock from the place because they would make more descend; that on the following Monday when plaintiff went to work he again complained of the danger to the shift boss who informed him that he would have the place timbered as soon as possible and for plaintiff to go to work, he would be all right; the plaintiff relying on his promise and assurance, etc., the court also stating the claim of defendant and informing the jury that they were the sole judges of the facts. The charge was not improperly argumentative. *Asplund* v. *Calumet & Hecla Mining Co.*, 529.

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MASTER AND SERVANT—Continued.

17. Although a specified danger is patent and is known to the servant, the master may be liable for injuries resulting therefrom if he has lulled the servant into a sense of security by insisting that there was no danger, or promising to remedy it. And, accordingly, if the injured employee regarded the hanging wall as so dangerous that it needed timbering to make it safe, but did not regard the danger as so imminent as to justify him in disregarding the assurance and direction of his superior servant, he was entitled to recover. *Id.* 530.

18. Where defendant's superintendent and manager in charge of bridge construction ordered one of the workmen to change a scaffold that was used in the work by nailing one end of a supporting plank to an old horizontal timber which was defective and insufficient to support the scaffold, as an inspection would have disclosed, and the workman, in performing the work, concluded it would not be secure and so advised the superintendent, who ordered him to proceed, saying that it was safe, the act of the superintendent was that of the employer in negligently selecting unsuitable material, and plaintiff's right to recover was not barred by the fellow-servant rule. *Buck* v. *Western Concrete Bridge Co.*, 646.

19. In an action for the wrongful death of defendant's servant, testimony that a fellow-servant pried on and strained a pulley, weakening it, was not a proper basis of liability, since it was the act of a fellow-servant not shown to have been brought to defendant's notice. *Clark* v. *Goldie*, 653.

20. And it was not evidence of the incompetency of defendant's foreman that he had never observed the peculiar sound emitted by a cracked iron pulley, which certain witnesses testified was always recognizable when a defective pulley was running. *Id.*

21. Testimony tending to show that the electric signaling apparatus and bell used in connection with the hoist in defendant's mine were defective and the bell gave unreliable or uncertain signals, that, when plaintiff's fellow-servant attempted to signal the operator to draw the miners up out of danger of a blast that they had lighted, the bell did not register the signal which should have been transmitted, and that no one but the hoisting engineer who knew nothing about such apparatus inspected it, and then only when something went wrong, that the miner who gave the signal attempted to give the correct one, but the bell did not sound the proper number of strokes, presented a question of fact relative to the defective condition of the apparatus. *Panela* v. *Castile Mining Co.*, 669.

22. *Held*, also, that there was evidence tending to prove that defendant was negligent in failing to maintain its hoisting apparatus in suitable condition to perform the service

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MASTER AND SERVANT—Continued.
of removing employees promptly from the vicinity of an explosion or blast. *Id.*

23. And *held*, that plaintiff's evidence tended to establish his claim that defendant had failed to warn plaintiff of latent danger arising from dynamite which had been left near the place of work by another crew. *Id.*

24. The relation of master and servant had ceased to exist, as between his employer and plaintiff, who had been working as a laborer in a quarry and had stopped at noon to eat and rest, seating himself on the ground beside a public highway, knowing that blasting was being done near by, and who was struck by a piece of rock thrown by a blast; the fellow-servant rule and doctrines of safe place and duty to instruct were not applicable. *Moronen* v. *McDonnell*, 691.

25. Plaintiff not being a loiterer or idle intruder, it was defendant's duty to give timely or reasonable warning of the firing of blasts. *Id.* 692.

26. In blasting out rock for use in a stone crusher, defendant was chargeable with the requirement of "reasonable care, commensurate with the attendant dangers, and with the duty to" cover or protect the blasts or give persons near by timely warning of the explosion. *Id.*

27. Where blasting had been carried on for three seasons without injury to person or property under the system adopted by defendant, and he employed competent men to perform the work, who gave notice by repeated calls of setting off explosions or blasts, who, in the instance in question, went both ways down the highway, one of them going within 50 feet of plaintiff and the other workmen resting in a place that they considered safe from the expected blast, defendant was not negligent; nor was the situation materially affected by the fact that plaintiff relied on the judgment of his fellow workmen in choosing the place, not having had so much experience as they. *Id.*

28. And where plaintiff had warning of one blast without taking any precautions, or attempting to avoid it, an omission to repeat the warning in the case of a second blast, not inducing plaintiff to remain or to incur additional peril, was not such negligence as to raise an issue for the jury. *Id.*

See CUSTOMS AND USAGES; EVIDENCE (11); INSURANCE (4); RAILROADS (1).

MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED —See WITNESSES (5, 6).

MEASURE OF DAMAGES—See LOGS AND LOGGING (5).

MEMORANDUM—See FRAUDS, STATUTE OF.

MINES AND MINING—See EXPLOSIVES (3); INJUNCTION (1, 4, 9); MASTER AND SERVANT (15-17, 21-24).

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MISDEMEANOR—See HOMICIDE (2).

MISREPRESENTATION—See PARTNERSHIP (2).

MOOT POINTS—See APPEAL AND ERROR (11).

MORTALITY TABLES—See APPEAL AND ERROR (7).

MORTGAGES.

1. In construing an instrument claimed to be a mortgage, but appearing on its face to be an absolute deed, the proof ought to be sufficient to overcome the presumption that the instrument is what it purports to be; evidence that it was intended merely as security should be clear and convincing. *Smith* v. *Smith*, 268.

2. Conflicting proofs relative to the intention of decedent grantor to execute a deed to his son as security for an indebtedness reviewed, and *held*, to support the trial court in finding that the deed was absolute. *Id.*

3. In a suit to restrain defendant from foreclosing a mortgage by advertisement, upon the alleged ground that defendant, as trustee, had entered into a contract of guaranty that was void as against public policy, by reason of defendant's occupying illegal and inconsistent positions, *held*, that if any harm had been done by the alleged improper conduct of defendant, the court could not remedy the illegality of the transaction by declaring the mortgage invalid. *Quigley* v. *Wolf*, 467.

MOTIONS—See BILLS AND NOTES (4); INJUNCTION (1); NEW TRIAL (2).

MOTOR VEHICLES—See DAMAGES (1); EVIDENCE (1).

MUNICIPAL CORPORATIONS.

1. On mandamus to compel the holding of a special election, as appointed by the charter commission of the city of Saginaw, the remedy will not be withheld because another suit in equity is pending wherein the validity of the "home rule" statute is attacked, the chancery court having issued no injunction or restraining order to prevent proceedings thereunder. *Attorney General, ex rel. Baum*, v. *City of Saginaw*, 432.

2. The claim of respondents that there is insufficient time to comply with all the statutory requirements is not a defense, but the provisions as to time for registration, etc., not being mandatory in their character, respondents will be compelled to act as near as may be in accordance with law. *Id.*

See NEGLIGENCE (5, 6); TAXATION.

MURDER—See HOMICIDE.

NAVIGATION—See LOGS AND LOGGING (2).

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NEGLIGENCE.

1. Evidence that the plaintiff bought a fur-lined coat, handled and sold by defendant to a local dealer, that he frequently had occasion to turn the fur collar up about his face and neck, that he had never suffered previously from any skin or blood disease, that about two weeks after he commenced to wear the coat he experienced a burning sensation on his face and neck which later developed into serious inflammation and grew better when he ceased to wear his coat, taken in connection with a letter from defendant to plaintiff admitting that some persons were injuriously affected by dyed fur, supported by other testimony of the same kind, warranted the court in submitting the case to the jury on the question of negligence and notice to defendant. *Gerkin* v. *Brown & Sehler Co.*, 46.

2. As a general rule the vendor of an article is not liable on account of his carelessness or negligence to others than the immediate purchaser, for mistakes in the nature or quality of an article, where the thing sold is in itself harmless, so far as the vendor knows, if he has made no false representations. *Id.*

3. Having knowledge that dyed furs of the kind defendant sold were liable to cause suffering and injury to the purchasers, even though only a small proportion of persons were injuriously affected, defendant was liable in damages to one who was injured in ignorance of the poisonous character of the furs or dyes. *Id.*

4. In the absence of any evidence that would tend to show negligence on plaintiff's part in trying to turn off defendant's tracks in advance of a moving car, which struck the end of his vehicle, plaintiff being delayed in his efforts to escape from the tracks by snow and ice banked up on either side, the court committed reversible error by leaving to the jury the question of contributory negligence, in plaintiff's failing to clear the track in time to avoid the collision. *Wingert* v. *Detroit United Ry.*, 199.

5. Where defendant village constructed a lighting system, using heavily charged wires, dangerous to human life, and thereafter permitted a telephone company to erect poles and extend its wires in the streets, passing in one place over the wires of the village, and where it appeared that one of the poles of the telephone company was not properly guyed up or braced, so that wires sagged and came in dangerous proximity to the wires of the lighting plant at the place of crossing, and there was evidence tending to show defective or insufficient insulation, resulting in the burning off of a wire, and the death of a child who came in contact with it, the question of the negligence of defendant village was properly left to the jury. It could not be determined as a question

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NEGLIGENCE—Continued.

of law that, because the wires of the village lighting plant were first in place, the negligence of the telephone company was the proximate cause of the injury. *Sykes* v. *Village of Portland*, 290.

6. A municipality is not relieved of liability for negligence, in constructing or maintaining an electric light plant used for commercial purposes, on the ground that its business relates to governmental functions. When a dangerous condition becomes apparent, the officials in charge of the lighting system are charged with the duty of removing the danger, if possible, and stand in no different situation than do employees of a private corporation. *Id.*

7. Evidence that plaintiff, who sustained injuries in boarding a street car, had at one time lived in a house of ill repute, but had suffered no infection or other disease from which her injuries might have arisen, was insufficient to justify the court in charging the jury that plaintiff could not recover if her former mode of life and not the fall caused the condition from which she suffered. *Lunde* v. *Detroit United Ry.*, 375.

See AUTOMOBILES; CARRIERS (1); EVIDENCE (6-11); EXPLOSIVES (2, 3); LOGS AND LOGGING (2); MASTER AND SERVANT; RAILROADS (2-5); STREET RAILWAYS; TRIAL (4).

NEGOTIABLE INSTRUMENTS—See BILLS AND NOTES.

NEWLY DISCOVERED EVIDENCE—See CARRIERS (3, 4); NEW TRIAL (3).

NEW TRIAL.

1. On defendant's motion for a new trial the court rightly refused to set aside the verdict on the affidavit of the president and treasurer of defendant corporation that he expected to be able to show by a witness that plaintiff had given a different account of the manner in which he was injured, tending to relieve defendant of liability; that he learned of the testimony after the trial and had not had sufficient time to procure an affidavit from the witness, whose sworn statement was not presented to the court nearly five months afterwards when the motion was argued. *Cummins* v. *Boyne City Tanning Co.*, 217.

2. Where defendant was charged with receiving a check for $593.56, which he was not entitled to, from his successor in the office of township treasurer, and on the trial plaintiff's evidence was contradicted by that of defendant and by certain alleged admissions of his successor in office, the issue was one for the jury and the court properly denied a motion for new trial on the ground that the weight of the testimony was for the jury. *National Surety Co.* v. *Grant*, 348.

3. It was not an abuse of discretion to deny a new trial for

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NEW TRIAL—Continued.

which plaintiff asked, on the ground of newly discovered evidence, when the testimony was merely cumulative and might have been produced on the trial with the exercise of due diligence. *Id.*

4. A verdict must be clearly against the great weight of the evidence to require the Supreme Court to reverse the decision of the circuit judge in denying a motion for a new trial. *Druck* v. *Antrim Lime Co.*, 365.

See CARRIERS (2-4); MASTER AND SERVANT (13).

NONRESIDENTS—See PROCESS.

NOTARY PUBLIC—See PRINCIPAL AND SURETY.

NOTICE—See APPEAL AND ERROR (3, 4); INSURANCE (7, 8); MASTER AND SERVANT (3, 14, 19); NEGLIGENCE (3).

OBVIOUS DEFECTS—See MASTER AND SERVANT (9, 11).

OPENING STATEMENT—See CRIMINAL LAW (1, 3); TRIAL (8).

OPERATION OF CARS—See STREET RAILWAYS (1).

OPINION—See FRAUD (6, 8, 9).

OPTION—See PARTNERSHIP (13).

PARADING—See INJUNCTION (9).

PARENT AND CHILD—See ADOPTION.

PAROL EVIDENCE—See COVENANTS.

PARTIES.

The public prosecutor, authorized by the attorney general to commence suit, was a proper moving party for the revocation of a liquor license obtained by fraud. *Andrews* v. *Auer*, 245.

See APPEAL AND ERROR (8, 11); CORPORATIONS (2); JUDGMENT; SET-OFF AND RECOUPMENT.

PARTNERSHIP.

1. Testimony tending to show the establishment of a private bank by several defendants, who were held out in advertisements and statements made as partners in the concern, and testimony tending to show that they were engaged in the attempt to organize several private banks with another incorporated bank in which they were interested as a center, *held*, to sustain a verdict for plaintiff against the members of the alleged partnership, on the theory that defendants permitted themselves to be held out to the public as partners in the private banking firm. *Folks* v. *Burletson*, 6.

2. As applied to partners, such holding out is fundamentally predicated on the general principle of estoppel by con-

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PARTNERSHIP—Continued.

duct, but comprehends, also, indirect misrepresentation and signifies that the purported partners have, by language and conduct, represented themselves, or knowingly have suffered others to represent them at large, as partners in such manner and to such an extent as to lead the public to believe that they are partners in fact. *Id.*

3. It is not necessary to show express authority to hold out a person as member of the firm; authority may be inferred from defendant's conduct. If he has, by signing prospectuses, or by being party to resolutions, or by statements made, or has in any other way so conducted himself as, in fact, to have authorized the holding out, he is liable. *Id.*

4. It was not error to admit in evidence an advertisement relating to a State bank in a neighboring town, wherein the defendants were mentioned by name as officers, directors and stockholders, followed by a statement that they were back of the private bank in question, representing a responsibility of about $300,000. *Id.*

5. Nor was it error to admit statements made by persons employed and placed in charge of the bank that defendants or some of them were running the private bank; the rule that an agent's authority cannot be proved by his own declaration was not violated thereby. *Id.* 7.

6. Where one of the defendants admitted his liability, after he had pleaded the general issue and did not suffer default to be entered against him, his representations, not made in the presence of the remaining defendants, and supported by his testimony showing copartnership relations, were properly received in evidence to establish the connection of defendants with the bank: and any possible error was cured by the action of the court in charging the jury that this evidence should not be considered. *Id.*

7. The court did not in anywise prejudice defendants by instructing the jury that a person who holds himself out as a partner of a firm is estopped to deny the representations as to the persons to whom the statements were made and as to others who acted in reliance on them, that reliance on mere rumor or hearsay would not be reasonable diligence, unless there was actual holding out to the public, that defendants' denial of any knowledge of such representations or statements should be a defense, unless the greater weight of the evidence established the contrary, that if there was a general holding out to the public by one or more of the defendants as members of a partnership or joint venture, depositors of the bank who relied thereon could recover: any possible error in such charge was in favor of the defendants as to the distinction between liability by holding out and liability by estoppel. *Id.*

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PARTNERSHIP—Continued.

8. The fact that a creditor relied on mere hearsay or rumor would not preclude him from recovering if he could establish by proof of facts and circumstances a holding out of defendants as members of the firm. *Id.*

9. Evidence that defendants suffered themselves to be held out as partners in the bank, and in fact associated together under an agreement to share the profits, although defendants denied the claim, warranted the trial court in finding that the verdict was not contrary to the weight of the evidence. *Id.*

10. All that is generally required to constitute a partnership as between the parties is that there should be an agreement to share in the profits and losses; and even less than this may make them responsible as between themselves and third parties. *Id.* 8.

11. Covenants of title in a deed executed by copartners to a third person, and not referring to any partnership relation are joint, not several. *Stewart* v. *Terwilliger*, 313.

12. Evidence that two brothers owned and dealt in certain lots jointly, that one of them gave to complainant a written option on the joint property, that the brothers advertised as Burcham Brothers, and had stated that they were partners and that they in fact had some business transactions as partners, the copartnership relation not being denied by them on the hearing, *held*, to sustain a decree finding the existence of a partnership. *Nichols* v. *Burcham*, 601.

13. Where the partnership business is to deal in real estate, one of the firm has power as agent for both to execute a contract to convey the joint realty, but it is necessary to show that they had dealings in the land and that the property included in the contract was a part of the property so dealt in. *Id.*

See SET-OFF AND RECOUPMENT.

PAVING TAX—See TAXATION.

PENALTIES—See INSURANCE (4).

PENDING SUIT—See MUNICIPAL CORPORATIONS (1).

PERFORMANCE—See DEEDS (2).

PERSONAL INJURIES—See AMENDMENTS (1); CARRIERS (1); CUSTOMS AND USAGES; DAMAGES (1, 2); EVIDENCE (5, 8, 9); EXPLOSIVES; MASTER AND SERVANT; NEGLIGENCE (1, 2, 7); RAILROADS; STREET RAILWAYS.

PHYSICIANS AND SURGEONS.

In an action by a surgeon as plaintiff for services performed in certain operations on defendant and his daughter, the court should have given a request preferred by defendant, that the plaintiff could not recover

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PHYSICIANS AND SURGEONS—Continued.

for services of defendant's family physician who assisted in the operations and who called plaintiff in to perform them, under an express arrangement or tacit understanding to divide the fees, to be charged by plaintiff; and a judgment that might, under the court's charge, have included the value of such services, was erroneous, since the other medical advisor, who was not a witness or party to the case, could not be bound or estopped, and might bring a separate action for his services. *McNair* v. *Parr*, 328.

See CONTRACTS (3); WITNESSES (1).

PLEA—See AMENDMENTS (3).

PLEADING—See AMENDMENTS (1, 2, 4, 5); APPEAL AND ERROR (12); BILLS AND NOTES (5); CORPORATIONS (4); DIVORCE (2); FRAUD (1, 2); HIGHWAYS AND STREETS (3); INJUNCTION (2, 3, 5, 6); INTOXICATING LIQUORS (3).

POISONOUS DYES—See NEGLIGENCE (1).

POISONS—See AMENDMENTS (1).

PRACTICE—See APPEAL AND ERROR (15, 16); TRIAL (7).

PRESUMPTIONS—See BILLS AND NOTES (2, 7); EXECUTORS AND ADMINISTRATORS (1); INSURANCE (3); MORTGAGES (1); RAILROADS (5); WILLS (1, 5).

PRINCIPAL AND AGENT.

Testimony that defendant hired a head bartender who conducted the business in defendant's absence, and employed plaintiff to assist him, that he exercised the power of hiring and discharging help and defendant knew that plaintiff was working in defendant's saloon, that the head bartender had been told by defendant to engage assistance, *held*, to present a case for the jury as to the contract of employment. *Devich* v. *Dick*, 173.

See CONTRACTS (4); PARTNERSHIP (3, 5, 13); WITNESSES (6).

PRINCIPAL AND SURETY.

For such damages only as are the proximate result of a notary's false or fraudulent certificate his surety is liable. One who parts with money upon false statements of a notary, afterwards receiving a forged deed with his fraudulent certificate, cannot recover on the bond. The misrepresentations, not the bond of the notary, constitute the proximate cause. *People, for use of Young*, v. *Nederlander*, 434.

See INDEMNITY; INSURANCE (8).

PRIVILEGE—See EVIDENCE (4); PROCESS; WITNESSES (1, 2).

PRIVILEGED COMMUNICATIONS—See EVIDENCE (2).

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PROCESS.

That portion of Act No. 76, Pub. Acts 1905 (5 How. Stat. [2d Ed.] § 12648), authorizing service by declaration upon "any person, whether privileged from arrest or not," does not permit service on a defendant who is a resident of Canada and who enters the jurisdiction to attend, for the purpose of testifying, a proceeding in the Federal court to which he and the plaintiff were parties litigant. *Coatsworth* v. *Wayne Circuit Judge*, 565.

See ARREST; FRAUD (8).

PROMISE TO REPAIR—See MASTER AND SERVANT (2, 16, 17).

PROSECUTING ATTORNEY—See PARTIES.

PROXIMATE CAUSE—See NEGLIGENCE (1, 5); PRINCIPAL AND SURETY.

PUBLIC IMPROVEMENTS—See TAXATION.

PUBLIC POLICY—See CONTRACTS (3); MORTGAGES (3).

QUESTIONS REVIEWABLE—See APPEAL AND ERROR (11, 13).

RAILROADS.

1. Violating a rule of defendant railroad company, plaintiff, a brakeman, having notice that a freight car carried a defective automatic coupling, attempted to open the coupling by hand so as to make up the car as part of his train, although, under the provisions of defendant's rule, it should have been put out of the train; in an action for personal injuries a verdict for defendant by direction of the trial judge is sustained on the ground that plaintiff was guilty of contributory negligence. OSTRANDER and MOORE, JJ., concurred on the ground that defendant's negligence, relied upon, was not the proximate cause of plaintiff's injury. *Coke* v. *Michigan Central R. Co.*, 260.

2. Evidence that plaintiff was struck by a locomotive at defendant's crossing, that he looked both ways, and, owing to smoke and darkness, was unable to see any train coming, that a freight had just passed on an adjacent track and a passenger train went by making considerable noise, smoke, etc., and plaintiff was unable to hear or see the approaching locomotive, which gave no signal and was running backwards without a headlight and with only small red and white lights displayed, sustained the trial court in refusing to direct a verdict for defendant. *Amanta* v. *Michigan Central R. Co.*, 280.

3. It is proper to submit to the jury the question of plaintiff's contributory negligence, if candid and intelligent men might reach different conclusions upon the question, or the testimony is conflicting. *Id.*

4. Nor did the court err in charging the jury that if the de-

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RAILROADS—Continued.

fendant operated its engine without lights after it was so dark as to obscure approaching objects, defendant was guilty of negligence. *Id.*

5. Evidence tending to show that decedent was crushed between two sections of a freight train which defendant's employees were coupling together on a street crossing in the night, that there was an open space between the standing and moving cars, through which decedent attempted to pass, and no lights were displayed at the end of the moving cars, that no trainmen were stationed at the crossing, and signals were not sounded, *held*, to raise an issue of fact for the jury upon the contributory negligence of deceased, since there were no eyewitnesses of the killing and decedent is presumed to have exercised ordinary care. *Wisniewski* v. *Detroit, etc., R. Co.*, 481.

See APPEAL AND ERROR (6, 8); EVIDENCE (5).

RATIFICATION—See CONTRACTS (4).

REAL PROPERTY—See EXECUTORS AND ADMINISTRATORS (1, 2); FRAUDS, STATUTE OF; LOGS AND LOGGING (5); PARTNERSHIP (13).

REASONABLE DOUBT—See CRIMINAL LAW (6).

RECEIPT—See FRAUDS, STATUTE OF.

RECEIVERS—See APPEAL AND ERROR (8).

RECORD—See APPEAL AND ERROR (1).

RECORDS—See WITNESSES (4).

RECOVERY BACK OF MONEY PAID UNDER THREAT OF PROSECUTION—See DURESS (1).

REGULATION—See EXPLOSIVES (1).

RELIANCE ON REPRESENTATIONS—See FRAUD (1).

RENT—See LANDLORD AND TENANT.

REPRESENTATIONS—See FRAUD (1, 2).

REQUESTS TO CHARGE—See CRIMINAL LAW (2); STREET RAILWAYS (10); TRIAL (2).

RESCISSION—See CONTRACTS (1, 2).

RESTRAINING UNLAWFUL ACTS—See INJUNCTION (8).

RETURN OF JUSTICE—See INTOXICATING LIQUORS (2).

REVOCATION—See WILLS (1, 4, 5).

RIPARIAN RIGHTS—See LOGS AND LOGGING (3).

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RIVERS—See LOGS AND LOGGING (2).

RULING OF COURT—See TRIAL (7).

SAGINAW CHARTER COMMISSION—See MUNICIPAL CORPORATIONS.

SALES.

1. Testimony of witnesses, who had owned a mare before defendant, that it had no bad habits or traits when they owned it several years before it was sold to plaintiffs, was not too remote, in an action for breach of warranty, where defendant claimed that the horse acquired the alleged vices or habits after plaintiffs purchased it. *Eaton* v. *Hope*, 411.

2. There being a dispute whether the plaintiffs' who were husband and wife, had jointly purchased the mare, the court was correct in submitting the question to the jury. *Id.*

See BANKRUPTCY (2); CONTRACTS (4); DAMAGES (3); EQUITY (1); FRAUD (6, 7); NEGLIGENCE (1).

SALOON—See INTOXICATING LIQUORS (1).

SAVING QUESTIONS FOR REVIEW—See APPEAL AND ERROR (5, 6, 10, 14).

SCAFFOLDS—See MASTER AND SERVANT (18).

SECONDARY EVIDENCE—See WITNESSES (4).

SEPARATE MAINTENANCE—See DIVORCE (2, 3).

SERVICE OF DECLARATION—See PROCESS.

SERVICE OF PROCESS—See MANDAMUS.

SET-OFF AND RECOUPMENT.

The liability of partners on a firm obligation is joint, not several, and in an action by one of the partners, the defendant may not set off against plaintiff's demand a debt due him individually from the copartners. *Stewart* v. *Terwilliger*, 313.

See AMENDMENTS (3).

SNOW AND ICE—See STREET RAILWAYS (10).

SPECIAL ASSESSMENTS—See TAXATION.

SPECIAL QUESTIONS—See WILLS (2, 6).

SPECIFIC PERFORMANCE—See CORPORATIONS (7); PARTNERSHIP (12).

STANDARD POLICY—See INSURANCE (9); LIMITATION OF ACTIONS.

STATUTE OF FRAUDS—See FRAUDS, STATUTE OF.

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STATUTE OF LIMITATIONS—See LIMITATION OF ACTIONS.

STATUTES—See APPEAL AND ERROR (16); CRIMINAL LAW (2); EXPLOSIVES (1, 2); HIGHWAYS AND STREETS (1); LIMITATION OF ACTIONS; MUNICIPAL CORPORATIONS (2).

STIPULATIONS—See APPEAL AND ERROR (11).

STOCK AND STOCKHOLDERS—See CORPORATIONS (1, 2, 6, 7).

STREET RAILWAYS.

1. Evidence that plaintiff's wagon was struck by defendant's car as plaintiff attempted to turn around, that he saw the car nearly 600 feet away when he started to drive on the track, and believed that he had time to make the turn, but was delayed somewhat by the size of his load and by the sliding of his wheel on the rail, that the car ran 195 feet after it struck plaintiff's wagon and the motorman saw that plaintiff could not get out of the way, at a point 200 feet from the place of the accident, testimony being also introduced to show that the car could be stopped in less than 80 feet if it was not exceeding a speed of eight miles an hour, warranted the submission to the jury of the question whether defendant was negligent. *Seebach* v. *Michigan United Rys. Co.*, 1.

2. It could not be said, as a matter of law, that plaintiff was guilty of contributory negligence: for a person is not chargeable with want of care, as matter of law, if he has reasonable ground, in the exercise of ordinary diligence, to believe that he can cross the track safely. Nor was the verdict contrary to the weight of the evidence. *Id.*

3. In an action for injuries sustained in a collision between a street car and plaintiff's conveyance, his testimony that he looked both ways and could see no car, that his vision was obstructed at a distance of about 240 feet by vehicles and similar objects, that he believed he could safely cross, but was struck by a car as his rear wheels were clearing the track, that the car ran 650 feet after it struck him and its speed was 40 to 50 miles per hour, presented an issue for the jury as to his contributory negligence. *Rahaley* v. *Detroit United Ry.*, 96.

4. In charging the jury the trial court erred in omitting to state the duty resting on plaintiff to act as a reasonably prudent man would and to state the degree of care also required of defendant's motorman; the language of the court's instructions being ambiguous. *Id.*

5. The jury should also have been instructed that additional care was required of both plaintiff and defendant's servant because of the fact that the street was badly torn up and the crossing difficult to make, as shown by the testimony. *Id.*

6. Negligence of the driver of an automobile in which plain-

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STREET RAILWAYS—Continued.

tiff was riding is imputable to plaintiff, in an action for injuries resulting from a collision with a street car. *Colborne* v. *Detroit United Ry.*, 139.

7. It was not erroneous for the trial court, in directing a verdict for defendant, to hold that the evidence showed that defendant's street car was lighted, upon the testimony of all defendant's witnesses and of one witness for plaintiff, uncontradicted except by plaintiff's testimony and that of the owner of the automobile in which she was riding, that they did not see the street car and saw no lights, the plaintiff admitting, however, that the car was lighted immediately after the accident. *Id.*

8. Evidence that plaintiff's companion, driving a motor car, looked both ways before crossing defendant's tracks but failed to see a lighted car approaching a short distance away in the block, although it was seen by a witness for plaintiff when it was nearly a block from the scene of the collision, that the automobile was proceeding slowly and under complete control, and that the evening was clear, the view unobstructed, and no passing vehicles distracted the attention of the driver, justified the direction of a verdict for defendant on the ground of contributory negligence. *Id.* 140.

9. The duty of defendant's motorman, when he saw that the driver of a vehicle on the tracks was making an effort to escape, and was impeded by slipping of his wheels on the snow banked at the side, was to delay until the wagon had left the track, and it was the duty of the plaintiff to leave the track with reasonable expedition after he discovered the presence of the car. *Wingert* v. *Detroit United Ry.*, 199.

10. Plaintiff's requests to charge that defendant corporation was liable if it left piles or ridges along the street so as to create obstructions to free use of the streets, was properly refused by the court. *Id.*

11. Defendant's motorman was, however, bound to operate his car with reference to all circumstances known to him, including the liability of the wheels of a conveyance to slip or slide along the rails and on the obstruction created by the snow. *Id.*

12. In an action for personal injuries sustained by plaintiff in driving his automobile across defendant's tracks without observing a lighted car which collided with the motor car, evidence *held*, to warrant the trial court in directing a verdict for defendant because of plaintiff's contributory negligence. *Kolchowsky* v. *Detroit United Ry.*, 516.

See CARRIERS (1-3); NEGLIGENCE (4, 7).

STRIKES—See INJUNCTION (1, 3, 4, 8, 9).

STRIKING OUT INDORSEMENT—See BILLS AND NOTES (4).

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SUFFERING—See DAMAGES (2).

SURFACE WATERS—See WATERS AND WATERCOURSES (1).

SURPRISE—See AMENDMENTS (2).

TAXATION.

An improvement tax for paving may be assessed against a corner lot for work done on both streets on which it lies, since it is benefited by the pavement on either street. *In re Johnson's Estate*, 500.

See CORPORATIONS (1); COVENANTS; EQUITY (2); LANDLORD AND TENANT (2).

TAXPAYER'S SUIT—See HIGHWAYS AND STREETS (3).

TELEGRAPHS AND TELEPHONES—See NEGLIGENCE (5).

TENDER—See CONTRACTS (1, 2).

TESTIMONY OF PARTNER'S ADMISSIONS—See PARTNERSHIP (6).

TIME—See INSURANCE (9); MUNICIPAL CORPORATIONS (2).

TRANSFER OF STOCK—See CORPORATIONS (1, 6, 7).

TRESPASSERS—See MASTER AND SERVANT (25).

TRIAL.

1. Any error that the trial court may have committed in refusing to permit defendant's counsel to cross-examine the motorman who operated defendant's car, offered by plaintiff for examination as defendant's agent or servant, under Act No. 307, Pub. Acts 1909 (5 How. Stat. [2d Ed.] § 12865), was cured or made harmless by the fact that answers to the questions were later elicited from the witness: the proposed cross-examination was proper in behalf of defendant. *Seebach* v. *Michigan United Rys. Co.*, 1.

2. Defendant's requests to charge the jury were not improperly denied when the court fully covered the same subjects in different language. *Andries* v. *Everitt-Metzger-Flanders Co.*, 111.

3. The action of the trial court in charging the jury not to consider improper comments of plaintiff's counsel in arguing the case, having reference to defendant's wealth, cured the error, so as not to require a reversal of the judgment. *Devich* v. *Dick*, 173.

4. On recross-examination in a negligence case, defendant's counsel was rightly permitted to ask plaintiff about her marriage and to show that it was a common-law relation, where he had been prevented from inquiring into the matter in his cross-examination, but plaintiff's attorney had shown on redirect that she was recognized by the

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TRIAL—Continued.

courts in certain litigation as the common-law wife of a decedent. *Lunde* v. *Detroit United Ry.*, 374.

5. Upon disputed testimony concerning the qualities of a mare which plaintiffs claimed had the habit of kicking, the respective vocations of plaintiff and defendant who had testified were a proper subject of comment in the argument. *Eaton* v. *Hope*, 411.

6. No reversible error was committed in permitting his attorney to ask leading questions of the plaintiff who was a foreigner and understood English with difficulty. The ruling was a matter for the discretion of the trial court. *Asplund* v. *Calumet & Hecla Mining Co.*, 529.

7. The action of the trial court in stating what plaintiff claimed, was not erroneous or reversible in the absence of an exception. *Patterson* v. *Gore*, 591.

8. That the attorney for defendant referred in his opening statement to incompetent evidence was not ground for reversal where the court excluded certain claims made by counsel and cautioned the jury to disregard anything that the evidence to be received did not sustain. *B. Marx & Son* v. *King*, 662.

9. Although affirmative proof of dealings of similar character to those in dispute was inadmissible under a previous ruling of this court in the cause, defendant was not precluded from questioning one of the plaintiffs, on cross-examination, concerning the discounts that he allowed other purchasers. *Id.* 663.

10. And upon his cross-examination, the court properly allowed an inquiry whether the plaintiffs had ever called upon the surety company, which indemnified them against loss through wrongful acts of their servants who were claimed to have conspired together to allow unauthorized discounts, to reimburse them for the losses by such claimed fraud; the inquiry had a bearing upon plaintiffs' good faith. *Id.*

11. Nor was it error to permit defendant's counsel to interrogate the witness with reference to their insolvency and good faith in transferring their assets to a corporation bearing the name of the insolvent partnership. *Id.*

12. Comments made by defendant's attorney which the court held to be improper and duly corrected, were not ground for reversal: and as to matters not brought to the attention of the trial judge by request for a ruling, they are not subject to review on error. *Id.*

See AMENDMENTS (3); APPEAL AND ERROR (4, 13, 15); BILLS AND NOTES (4); CONTRACTS (3); CRIMINAL LAW (1-3); DURESS (3); EVIDENCE (10); MASTER AND SERVANT (4, 9, 13, 16); NEGLIGENCE (4, 7); PARTNERSHIP (7); STREET RAILWAYS (4); WILLS (2, 6); WITNESSES (3).

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TRUSTS—See BANKRUPTCY (1); EQUITY (1); MORTGAGES (3).

ULTRA VIRES—See PARTNERSHIP (13).

UNDUE INFLUENCE—See WILLS (3, 7).

VALUE OF USE—See DAMAGES (1).

VARIANCE—See FRAUD (1).

VENDOR AND PURCHASER—See FRAUD (9); INSURANCE (1); PARTNERSHIP (13).

WAIVER.

A waiver is a voluntary relinquishment of a known right. *Dahrooge* v. *Rochester German Ins. Co.*, 442.

See INSURANCE (10, 11); WITNESSES (1).

WARNING—See EXPLOSIVES (3); MASTER AND SERVANT (25-28); RAILROADS (4).

WARNING AND INSTRUCTING SERVANTS—See MASTER AND SERVANT (10, 15, 23).

WARRANTY—See APPEAL AND ERROR (12); DAMAGES (3); SALES (1).

WATERS AND WATERCOURSES.

In a suit to enjoin the maintenance of a dam on premises of the defendant, resulting in turning on to complainant's property water which had previously crossed over defendant's land, thereby increasing the volume of water which flooded complainant, evidence, although in conflict, sufficiently sustaining complainant's contention that the dam turned all the water away from defendant's lands that they would naturally receive, and that defendant's obstruction caused the same to flow across complainant's property, warranted a decree granting the injunction. *Feldkamp* v. *Ernst*, 550.

See ELECTION OF REMEDIES; JUDGMENT; LOGS AND LOGGING (1 2).

WEIGHT OF EVIDENCE—See CARRIERS (2); LOGS AND LOGGING (4); NEW TRIAL (2, 4).

WILLS.

1. The presumption that testator revoked his will, from not finding the instrument or from finding it mutilated, is not overcome by proof that persons who would be injuriously affected by it had opportunities to destroy or mutilate it; but if other suspicious circumstances exist the presence of motive for its destruction may sustain a finding that the will was unlawfully destroyed. *In re Foerster's Estate*, 574.

2. On the trial of a will contest, findings, in answer to special questions submitted to the jury, that decedent executed

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WILLS—Continued.

the will proposed for probate, were conclusive on the contestant who submitted the questions. *Id.*

3. Upon considering all the testimony in relation to competency of the testator, undue influence, and due execution of the will, it is *held*, that there was no competent evidence of undue influence but the other questions were for the jury. *Id.*

4. Statements of the testator, made subsequent to the execution of a will, tending to show his purpose to revoke the will, were properly received in evidence, in connection with affirmative testimony that he destroyed it by tearing. *Id.*

5. *Held*, also, that the evidence was insufficient to rebut the presumption that testator had revoked the testament, arising from nonproduction of the instrument, and that the verdict was contrary to the great weight of evidence. *Id.*

6. It was error to submit to the jury a special question as follows: "Did said August Foerster tear or burn said will on August 25th, intending to revoke the same?" The question could not be answered unequivocally and intelligently. *Id.*

7. Where the contestant, after the death of the testator, presented two petitions to the probate court, stating that the deceased left no will, and she was his only heir, and proponent claimed the statements were fraudulent, and where the contestant, as an explanation, claimed she did not know the instrument in question was a will, that she had signed the petitions without reading them and supposed her brothers and sisters were dead, the facts had no tendency to establish undue influence. *Id.* 575.

See APPEAL AND ERROR (1); DEEDS (3); WITNESSES (1).

WITNESSES.

1. In a will contest, it is the right of a contesting heir, under Act No. 234, Pub. Acts 1909 (5 How. Stat. [2d Ed.] § 12826), amending 3 Comp. Laws, § 10181, to waive the rule of privilege as formerly applied to testimony of an attending physician employed by decedent; for that purpose such heir is a personal representative of the estate. *In re Oldenberg's Estate*, 150.

2. No privilege is conferred by statute on either party to a divorce case so as to permit one to decline to take the stand as a witness upon the request of the other. As to many subjects, with the consent of the other party, the husband or wife may be examined and may be compelled to give testimony on competent matters, not excluded by statute. Act No. 307, Pub. Acts 1909; 3 Comp. Laws, § 8652 (4 How. Stat. [2d Ed.] § 11489). *Bauer* v. *Bauer*, 169.

3. The extent of cross-examination to show the true char-

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WITNESSES—Continued.

acter of a witness, being left mainly to the discretion of the trial court, there was no prejudicial error in permitting defendant's counsel to show that plaintiff had conducted a house of doubtful reputation. The examination was not open to the objection that counsel was attempting to impeach the witness by showing unchastity. *Lunde* v. *Detroit United Ry.*, 375.

4. A witness for respondent, having testified that he worked for a railroad company about two or three years at different times, could not be impeached by introducing in evidence records of the company not shown to be complete or correctly kept. *People* v. *Hammond*, 416.

5. The testimony of mere clerk and bookkeeper of a local agent of defendant fraternal benefit association, relating to matters equally within the knowledge of a deceased member of the society, was not barred by 3 Comp. Laws, § 10212, as amended by Act No. 239, Pub. Acts 1901, and Act No. 30, Pub. Acts 1903 (5 How. Stat. [2d Ed.] § 12856). The term "agent," as used in the statute, does not have reference to a subagent whose appointment was not authorized or made by defendant corporation. *Rousseau* v. *Brotherhood of American Yeomen*, 568.

6. On the trial of an action upon a benefit certificate, the trial court erred in refusing to admit the testimony of a clerk of defendant's local agent, offered to show that decedent was in arrears and she sent him a notice as required by the rules of the society; and an admission of defendant's attorney that the testimony of the agent himself would be barred, was not binding on the court. *Id.*

See CRIMINAL LAW (4, 5, 7); DIVORCE (1); LARCENY; PROCESS; TRIAL (1, 11).

WORDS AND PHRASES—See ADOPTION; DEEDS (3); INSURANCE (4, 6); WAIVER.

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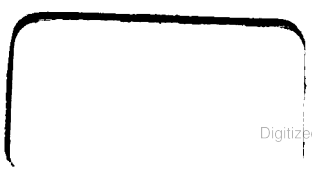

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